

89-380

No.

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CARL P. CALDWELL,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

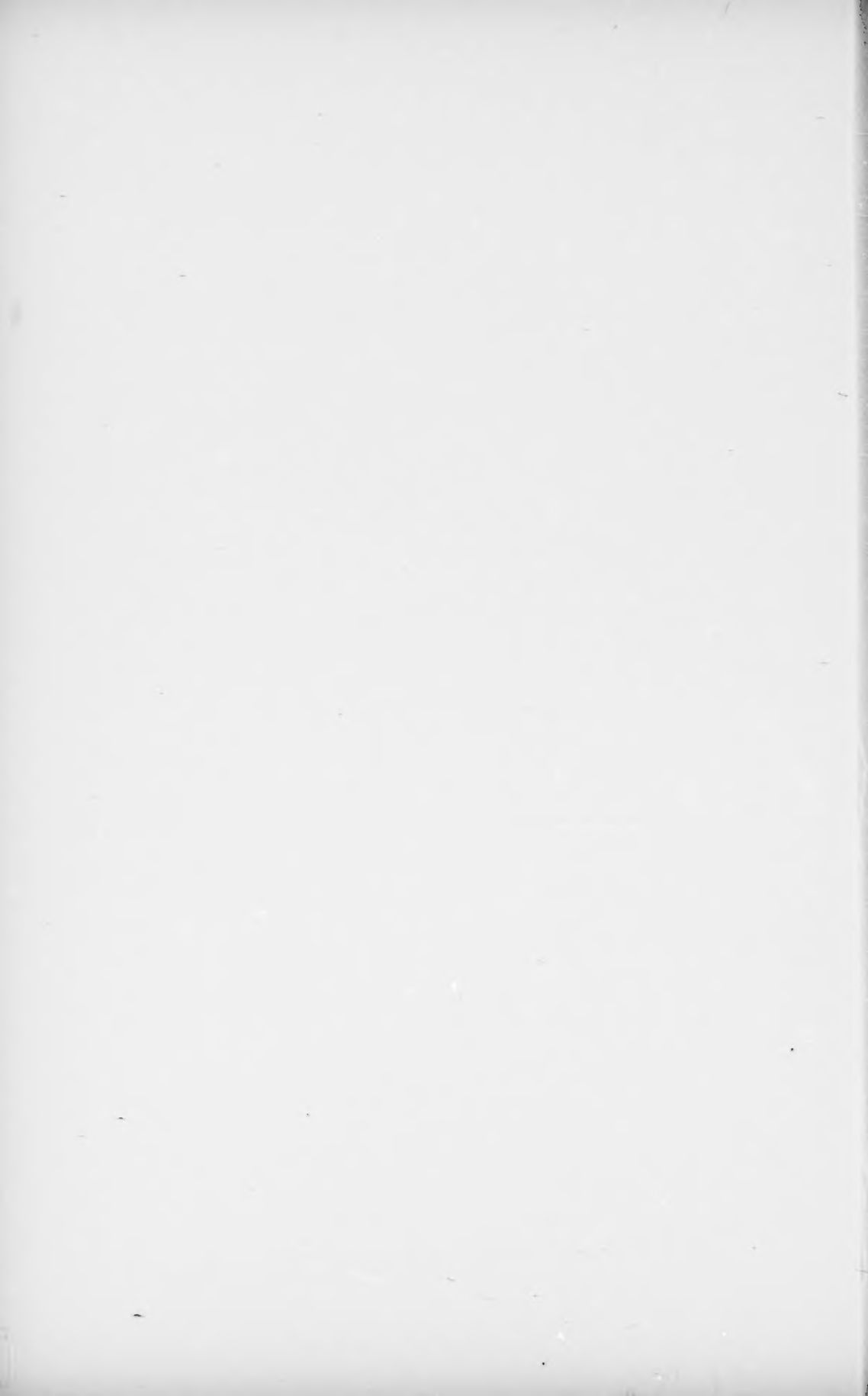
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Did the Southwestern Bell Telephone Company's pension plan provide for nonforfeitable benefits as required by the Age Discrimination in Employment Act in order to permit the involuntary retirement of Carl Caldwell at age 65 under the bona fide executive exception to mandatory retirement at age 70?

Was Caldwell improperly denied, by summary judgment, a jury trial on the issue of whether he was a bona fide executive, especially in light of: (1) the divergent inferences from the evidence before the District Court, (2) the District Court's sua sponte action, and (3) Bell's inability to meet its clear and convincing burden of proof standard?

Was Caldwell improperly denied the right to amend his Complaint in 1982 and again in 1986, after he discovered facts from Bell that supported: (1) an

alternate theory that Bell failed to meet another condition precedent to the use of the AEDA's bona fide executive exception, and (2) an alternative cause of action that Bell's implementation of the exception was in violation of the terms in Bell's pension plan and also a subterfuge to evade the purposes of the ADEA?

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The petitioner Carl P. Caldwell ("Caldwell") prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered on April 24, 1989. The Order overruling Caldwell's request for rehearing with suggestion for rehearing en banc was entered on June 1, 1989.

OPINIONS BELOW

The unreported Order and Judgment of the Court of Appeals appears in Ap.1-48¹ to this Petition. The Order denying Caldwell's request for a rehearing en banc, appears at Ap.49.

The unreported Memorandum Opinions and Orders of the District Court filed July 17, 1987, May 22, 1986, and August 20,

¹ References herein to the District Court Opinions are "DC.Op.p.____" preceded by the date of the particular opinion. References to the Court of Appeals opinion are "CA.Op.p.____". References to the page or pages in the Appendix are "Ap.", followed by the page number. The appendix is separately bound.

1982, appear at Ap.56,72&84, respectively. The Judgment of the District Court filed September 30, 1987, and as amended on January 28, 1988, appear at Ap.51&54, respectively.

JURISDICTION

The Order of the Court of Appeals was dated and entered on April 24, 1989. The Order denying Caldwell's petition for rehearing with suggestion for rehearing en banc was dated and entered on June 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTION, STATUTES, RULES

AND REGULATIONS INVOLVED

1. The U.S. Const. Amend. VII.
2. Portions of the Reorganization Plan No. 1 of 1978, §2, 92 Stat. 3781, 5 U.S.C., app. 1.
3. Portions of the Reorganization Plan No. 4 of 1978, §101(a)&(b), 92 Stat. 3790 & 3792, 5 U.S.C., app. 1.
4. The Internal Revenue Code of 1954

("Code"), and particularly portions of 26 U.S.C. §§411(a)(3)(B), 414(b) & 1563(a)(1).

5. The Age Discrimination in Employment Act of 1967 as amended ("ADEA"), and particularly portions of 29 U.S.C. §§621, 623(a)(1), 623(f)(2), 626(c)(2), 628, 631(a), & 631(c)(1).

6. The Employment Retirement Income Security Act of 1974 as amended ("ERISA"), and particularly portions of 29 U.S.C. §§1002(19), 1053(a)(3)(B), 1060 (a)(2)&(c), 1102(b)(3) and 1104(a)(1)(D).

7. Portions of Federal Rules of Civil Procedure, Rules 15(a), 38(a)&(b) and 56(c).

8. Portions of 26 CFR §1.411(a)-4.

9. Portions of 29 CFR §§541.1, 860.120(c), 1625.12, 2530.203-3(a)&(c), and 2530.210(b).

10. Portions of proposed and final regulations, explanations, interpretations, and notification, in 43 FR 59098,

et seq., [Dec. 19, 1978], and in 44 FR 66791, et seq., [Nov. 21, 1979].

Except where otherwise indicated, these statutes, rules, regulations, interpretations and notifications are cited as they existed at the time Caldwell was involuntarily retired on November 30, 1979. Their pertinent texts appear at Ap.97-146.

STATEMENT OF THE CASE

Caldwell initiated this case in the United States District Court pursuant to the provisions of 29 U.S.C. §626(b)&(c) of the ADEA as amended in 1978 [29 U.S.C. §§621-634]. Jurisdiction of the District Court was conferred by 29 U.S.C. §626(b)&(c). Caldwell's Complaint alleged that the respondent, Southwestern Bell Telephone Company ("Bell"), had forced him to retire on November 30, 1979, at age 65, in violation of the age 70 protection of the statute, and therefore requested reinstatement or in the

alternative damages. Bell answered that Caldwell was lawfully retired under 29 U.S.C. §631(c)(1) because he was a bona fide executive. Caldwell maintained that he was not a bona fide executive and that even if the trier of fact (a jury, which he requested) should hold against him on that issue, the exception to the age 70 requirement as contained in 29 U.S.C. §631(c)(1) was not available to Bell. Among other reasons, Bell did not meet a condition precedent to the utilization of the exception which required that the pension benefits applicable to Caldwell had to be "nonforfeitable".

The District Court held that the "retirement" at age 65 was unlawful because it was accomplished solely under the bona fide executive exception to the ADEA and the exception could not be relied on because the pension benefits under Bell's plan did not meet the requirement that they be nonforfeitable.

[8/20/82, DC.Op.pp.3&4; Ap.90-92]. The facts supporting the correctness of this ruling are set forth in the Argument portion of this Petition.

On this issue, the Court of Appeals reversed. [CA.Op.p.25; Ap.46]. In doing so, it acknowledged that on November 30, 1979, (when Caldwell was "retired") Bell's pension benefits were not "nonforfeitable" as required by 29 U.S.C. §631(c)(1), and continued so until Bell amended its plan on February 1, 1982, in order to meet the DOL's final interpretation effective January 1, 1982. 29 CFR §2530.203-3(c)(1).

Nevertheless, the Court of Appeals held that Bell should be excused from its violation of the ADEA because the law concerning the interpretation of the term "nonforfeitable" was in a "state of flux" on November 30, 1979. In the Argument portion of this Petition it will be shown that there is no valid justification for

the "state of flux" ruling. The Court of Appeals further held that since a regulation contrary to the wording of the statutes could have been issued (but was not so issued), that Bell did not have to comply with the clear wording of the statutes.² Such a holding is in conflict with this Court's recent pronouncement in Public Employees Ret. Sys. of Ohio v. Betts, 109 S.Ct. 2854, 2863 (1989).

On August 20, 1982, the District Court denied Bell's motion for summary judgment on the issue as to whether Caldwell held a bona fide executive position, holding in effect, that such an issue was at least a question for the jury. Subse-

2 This holding is at odds with a D.C. Circuit Opinion that acknowledged that a reviewing court's "cognitive powers" are "constrained" by the actual words and objective meanings of the relevant statutes and regulations and one can only rely on those actual words and not "some agency's hidden intentions and idiosyncratic interpretations." Shepard v. Merit System Protection Bd., 652 F.2d 1040, 1045 (D.C. Cir. 1981).

quently on May 22, 1986, the District Court addressed additional issues, including questions involving the amount of damages. At that time, and without the bona fide executive issue being raised again by either party, the District Court ruled, sua sponte, by summary judgment that Caldwell was a bona fide executive [and without any evidentiary hearing, or the submission of the question to a jury, as requested by Caldwell and as provided in 29 U.S.C. §626(c)(2)]. Caldwell submits the fact he was denied a jury trial on this issue is in conflict with the 7th Amendment to the U.S. Constitution, 29 U.S.C. §626(c)(2), Rules 56(c) & 38(a), F.R.Civ.P., and with numerous holdings of this Court, including Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Further facts and authority on this issue are contained in the Argument portion of this Petition.

Based on information obtained solely by post-Complaint discovery procedures, Caldwell twice moved to amend the Complaint by alleging additional facts which, when proved, would have likewise shown his forced retirement to be unlawful under the provisions of the ADEA. [Ap.158-161&163]. The District Court twice refused permission to amend and in so doing stated no reason or justification whatever. [8/20/82, DC.Op.pp.6; Ap.95. 5/22/86, DC.Op.p.7;Ap.82-83]. Caldwell submits that this constitutes an abuse of discretion and is contrary to the holding of this Court in Foman v. Davis, 371 U.S. 178 (1982). The Court of Appeals affirmed, without discussion, simply holding that it found no abuse of discretion. [CA.Op.p.26;Ap.47&48]. The facts and law concerning this issue are more fully discussed in the Argument portion of this Petition.

Based on its holdings concerning

"nonforfeitable" and "bona fide executive", the Court of Appeals found it unnecessary to address the various other issues raised by the parties.

ARGUMENT

I. PENSION BENEFITS NOT NONFORFEITABLE

A. Concept of Nonforfeitable

The concept of nonforfeitable is a simple one. A pension plan must provide that its benefits are nonforfeitable except for certain permitted forfeitures or suspensions.³ See: 29 U.S.C.

§1002(19); Riley v. Meba Pension Trust, 570 F.2d 406, 409 (CA2 1977).

It is permissible for a plan to provide for the suspension of a retiree's benefits for the period of time that the retiree is employed by his former employer, the employer who maintained

³ A provision for an impermissible suspension of pension benefits makes the benefits "conditional" and therefore "forfeitable" under 29 U.S.C. §1002(19). See also: 26 CFR §1.411(a)-4(a).

the plan under which those benefits were being paid. When a plan provides that benefits will be suspended if a retiree obtains employment from other than his former employer, an impermissible forfeiture occurs. This is against public policy as it discourages a retiree from seeking gainful employment elsewhere. 29 U.S.C. §621; Macellaro v. Goldman, 643 F.2d 813, 815 (CA DC 1980). Such a forfeiture is prohibited by both ERISA and the Code and also prevents the use of the bona fide executive exemption under the ADEA [29 U.S.C. §631(c)(1)].

B. Concept Applied To Case At Bar

The District Court determined that Bell's pension plan benefits were not nonforfeitable at the time of Caldwell's retirement because the plan contained provisions for the forfeiture of pension benefits if Caldwell were employed by certain employers other than his former employer (the one that maintained the

plan under which his benefits were being paid). [8/20/82, DC.Op.p.4;Ap.91-92]. Since the pension benefits were not nonforfeitable, Bell could not then meet one of the conditions precedent to Caldwell's early retirement under the bona fide executive exception. 29 U.S.C. § 631(c)(1). The Court of Appeals, though agreeing with the District Court's analysis of the statutory requirements for Caldwell's early retirement, disagreed that the definition of forfeitability was settled law. [CA.Op.pp.14&25;Ap.25&45]. The Court of Appeals concluded that forfeitability was subject to an interpretation which was in conflict with the language of the statute, and then on that premise, reversed the District Court's holding that Caldwell's involuntary retirement under 29 U.S.C. §631(c)(1) was unlawful. It held that Bell should not be held responsible for violating the statutory

and regulatory directives.

The Court of Appeals' opinion hinges on a gross misapplication of the law. It noted that Congress empowered the Department of Labor ("DOL") to issue regulations, if necessary, to determine when it is permissible to forfeit pension benefits when the retiree is employed by the employer who maintains the plan. [CA.Op.p.15;Ap.26]. The Court of Appeals concluded that such a delegation by Congress meant that the then existing statutory standard for determining forfeitability was unenforceable until Labor issued such a regulation. [CA.Op.p.16;Ap.29]. That conclusion was based on the assumption that the DOL could issue a regulation that could override the existing statutory standard. [Id.]. What the Court of Appeals failed to recognize was the well settled rule of law that a regulatory body cannot validly promulgate any regulation in conflict

with a statutory provision. Public Employees Ret. Sys. of Ohio v. Betts, supra.

Also, the Court of Appeals selectively applied the statutory requirements and final regulations of the ADEA, ERISA and Code in effect at the time of Caldwell's retirement. Furthermore, it held that Bell's refusal to follow the clear wording of the statutes was excusable. It rationalized such a holding on a series of "novel" theories. As an example, the Court of Appeals relied upon an IRS form letter purportedly approving an issue for which the IRS had no responsibility and for which the IRS had expressly disavowed responsibility. In fact, the letter did not even contain the critical language attributed to it by the Court of Appeals.

C. At Caldwell's Retirement The Pension Benefits Were Not Nonforfeitable.

Although the ADEA does not specif-

ically define nonforfeitable, it is certain that the pension plan referenced in the bona fide executive exception of the ADEA and the concept of "nonforfeitable" as used therein is, of commercial necessity, in pari materia with the term "nonforfeitable" as used in both ERISA and the Code.⁴ In particular, 29 U.S.C. §1053(a)(3)(B) and 26 U.S.C. §411(a)(3)(B) are two identically worded statutes that are incorporated into the bona fide executive exception provision of the ADEA. [CA.Op.pp.21-22;Ap.38-39]. These sections permit a suspension (forfeiture) of benefits for the period of time the retiree is employed "by the employer who maintains the plan under which such benefits were being paid". Furthermore, the ERISA definitional

⁴ This is implicit in the EEOC regulation existing at Caldwell's retirement, that specifically adopted the statutory standard set forth in both ERISA and the Code. 29 CFR §1625.12(k)(1).

section of "nonforfeitable" in 29 U.S.C. §1002(19), is applicable to 29 U.S.C. §1053(a)(3)(B).

Certainly, the wording of the statutes was clear and the law was settled at the time of Caldwell's involuntarily retirement.⁵ At that time, the following statutes and regulations were in place:

(1) It was unlawful for an employer to retire an employee between 40 and 70 years of age because of age. 29 U.S.C. §§623(a)(1) & 631(a).

(2) However, an exception to the foregoing was permitted if, inter alia, a bona fide executive was retired when he was entitled to an immediate nonforfeitable annual retirement benefit from the pension plan of his employer. 29 U.S.C. §631(c)(1).

5 This is contrary to the statement on p. 25 of the Court of Appeals Opinion [Ap.45], that the "law on forfeitability * * * was not settled" on Caldwell's retirement.

(3) The bona fide executive exception to the ADEA could not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree, except in those instances described in 26 U.S.C. §411(a)(3)(B)(i). 29 CFR §1625.12(k)(1).

A plan could only provide for the cessation of payments if the retiree was rehired by his former employer, or as stated in the statutes, a forfeiture was permissible if the plan provided for the forfeiture of the retiree's pension benefits upon reemployment "by an employer who maintains the plan under which such benefits were being paid". 26 U.S.C. §411(a)(3)(B)(i) and 29 U.S.C. §1053(a)(3)(B)(i). Upon a review of these statutes, it is abundantly clear that Bell's plan allowed for an impermissible forfeiture; thereby, the pension benefits were not nonforfeitable.

The Bell plan provided for the

suspension of benefits when a retiree was employed by any of 37 companies with whom Bell had an interchange of benefits agreement. [CA.Op.pp.10-11;Ap.18-19].

Each of the companies who were parties to the agreement maintained their own pension plan separate and apart from each other. [CA.Op.p.10;Ap.18]. Even though

most (but not all) of the companies who were a party to the agreement could meet

the 80% ownership test for the controlled group of corporations of which Bell was a

part, they could not meet the requirements of ERISA and the Code because

they did not have a single plan maintained by all members of the controlled group. [CA.Op.p.11;Ap.19]. See:

26 U.S.C. §§411(a)(3)(B), 414(b) & 1563;

29 U.S.C. §§1053(a)(3)(B) & 1060(a)(2)

&(c). Moreover, two of the companies did

not meet the 80% controlled group test

and one other company had no owner rela-

tionship. Bell knew its plan failed to

meet the nonforfeitable standard of the statutes either for a member of a controlled group of corporations, or as a single employer, when it retired Caldwell. However, Bell claims it did not have to be in compliance with either until the proposed regulation became final. On behalf of Bell, its parent American Telephone and Telegraph Company ("AT&T") wrote the DOL requesting that the proposed regulation be changed so that the provision of Bell's plan would not continue to be unlawful after the final regulations were issued. [CA.Op.pp.17-19;Ap.31-33]. In apparent recognition of the fact that this was not going to occur, AT&T, on October 1, 1980 (subsequent to Caldwell's retirement), merged the separate Bell System plans into a single plan for all those companies who were 80% or more owned by AT&T so as to meet the prerequisite "controlled group" test. This left but two companies

in the interchange agreement who still could not meet the "controlled group" test.⁶ The merged AT&T plan continued to provide for an unlawful suspension of benefits for retirees employed by these two companies until Bell amended its pension plan when final DOL regulations were issued, effective January 1, 1982.

The DOL knew that Bell's request for an alternate rule that would give effect to the practices of the Bell System would not meet the statutory standard and refused to make the changes suggested by AT&T. [CA.Op.p.16;Ap.28-29]. The District Court knew that Bell could not meet the statutory standard at the time of Caldwell's retirement and so held. [8/20/82, DC.Op.p.6;Ap.95]. The Court of Appeals also knew the plan did not meet

6 CA.Op.p.21;Ap.37. However, the third company was not merged into Bell. Rochester Company had no owner relationship with Bell companies and its interchange agreement was terminated 12/31/79.

the nonforfeitable standard. [CA.Op.p.14;Ap.24]. However, in numerous pages of rationalization, it determined that the law was subject to an interpretation in conflict with the clear wording of the statutes [CA.Op.p.21;Ap.38], because the DOL could have issued a regulation overriding the statutory provisions. [CA.Op.p.22;Ap.39-40]. The Court of Appeals held, in effect, that if the DOL had issued such a final regulation and if the regulation had said what Bell wanted it to say, that Bell could have been able to meet the regulatory requirements (but not the superseding statutory requirements) and, therefore, Bell should not be punished for its illegal retirement of Caldwell. [CA.Op.p.25;Ap.45-46]. This was the astonishing conclusion reached, even though the Court of Appeals recognized that such a final regulation could have no retroactive effect. [CA.Op.p.25;Ap.46].

D. Regulations Cannot Supersede Statutes

In its flawed analysis, the Court of Appeals failed to recognize that neither the DOL nor the EEOC could have validly issued any regulation that would have abrogated the clear wording of the statutes.

"It is the role of an administrative agency to execute legislative policy; neither agencies nor courts are free to rewrite acts of Congress." E.E.O.C. v. City of Mt. Lebanon, Pa., 842 F.2d 1480, 1495 (CA3 1988).

Any change in the regulations that would have arguably permitted Bell to continue with the provisions in its then existing plan would have been in conflict with the clear statutory directive and hence would have been unenforceable. Public Employees Ret. Sys. of Ohio v. Betts, supra.; Southeastern Community College v. Davis, 442 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979).

The Court of Appeals based its decision on the fact that the DOL had

authority to issue regulations concerning the plain meaning of a 1974 statutory term, i.e., "employer who maintains the plan", for purposes of determining whether a plan contained an impermissible forfeiture of benefits provision. It noted that the DOL had not issued such a final regulation prior to Caldwell's November 30, 1979, retirement [CA.Op.p.17;Ap.30]⁷ and gives little credence to a then proposed regulation, which did no more than restate the statutory requirement. Therefore, so concluded the Court of Appeals, that absent any final regulation, Bell was free to advance its own interpretation and rely on the same [CA.Op.pp.21&24;Ap.38&43-44], even though (1) the wording of the stat-

7 The Court of Appeals gives little consideration to the fact that the ADEA itself defines both employer and employee [29 U.S.C. §630(b)&(f)] and the fact that the EEOC, not the DOL, was authorized to issue regulations under ADEA at Caldwell's retirement. 29 U.S.C. §628.

utes was clear and unambiguous, and (2) the DOL adopted, in its final regulations, the only available definition, the same statutory definition as set forth in the proposed regulation. [CA.Op.pp.19&20;Ap.34-36].

Aside from the erroneous analysis that the DOL could have expanded the definition of permissible pension plan benefit forfeitures, so as to apply to the employment by someone other than the "employer who maintains the plan", the fact is that at Caldwell's retirement, not only had the EEOC adopted the statutory definition of nonforfeitable [29 CFR §1625.12(k)(1)], but so too had the DOL, the very same DOL that the Court of Appeals identified as the one authorized to issue a regulation in conflict with the statutes. On December 19, 1978, the DOL preceded the text of the proposed regulation with a "Notice" that warned all employers that:

"[s]uspension of benefit payments by plans prior to adoption of the regulation will be governed by section 203(a)(3)(B) of the Act [29 U.S.C. §1053(a)(3)(B)] without reference to the regulation [i.e., this proposed regulation]". 43 FR 59098 at 59099, 12/19/78. [Bracketed comments supplied herein and throughout this Petition unless otherwise indicated].

Therefore, the existing regulations promulgated by both the EEOC and the DOL simply adopted the statutory definitions.³ AT&T was clearly aware of

3 In this regard it is noted that Bell should also have been required to comply with the proposed rule, because the standard in the proposed rule did not change any then existing standard. St. George's University School of Medicine v. Bell, 514 F.Supp. 205, 210 (D.C. D.C. 1981). Furthermore, the "directive" in the Notice that accompanied the proposed rule, in the nature of an "interim regulation" was likewise binding on Bell. Wright v. Roanoke Redevelopment & Hous., 479 U.S. 418, 107 S.Ct. 766, 774, 93 L.Ed.2d 781 (1987)(interim regulations are entitled to deference as a valid interpretation of a statute and are legally enforceable); where a regulation repeats verbatim or merely tracks a statute, explaining something the statute already requires, the notice-and-comment procedures of 5 U.S.C. §553 are unnecessary. Komjathy v. Nat'l Transp. Safety Bd., 832 F.2d 1294, 1296-1297 (D.C. Cir. 1987); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987); United (FOOTNOTE 8 CONT'D NEXT PAGE)

this and the fact that Bell's plan did not meet the statutory test when (prior to Caldwell's retirement) Bell wrote to the DOL and pleaded for it to expand the proposed regulations so as to make Bell's "illegal" plan "legal". AT&T was very candid in its plea, when it stated, as noted by the Court of Appeals:

"A literal application of the proposed Department rule would not allow for the suspension of pension payments upon the reemployment of a retiree who is receiving a pension payment from one Bell System 'interchange' company and who is reemployed by another such company. This is because the proposed regulation appears to restrict the suspension to instances of reemployment by an employer who maintains the same plan as the

(FOOTNOTE 8 CONTINUED): Technologies Corp. v. U.S.E.P.A., 821 F.2d 714, 718 (D.C. Cir. 1987)(where a regulation is a codification of now statutory requirements, notice-and-comment procedures are not required.) In addition, such a directive or interpretation by the agencies charged with the enforcement of the ADEA, is entitled to great weight and deference. Griggs v. Duke Power Co., 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 159 (1971); Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed. 2d 616 (1965); Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 and 754 (CA7 1983).

employer making the pension payments and who is also a member of the control group." [Emphasis supplied by AT&T; CA.Op.p.18;Ap.32-33].

AT&T was correct. A "literal application of the proposed" regulation, (which did nothing more than adopt the then existing statutory standard) resulted in the inescapable conclusion that Bell was violating then existing pension law provisions, i.e., the nonforfeitability of pension plan benefits provisions. This is so because Bell's plan provided for the suspension of benefits in instances of reemployment of a retiree by an employer who neither maintained the plan nor was a member of the controlled group of the Bell System. [Ap.179].

Of course, the DOL (and correctly so) refused to accede to AT&T's request, as such actions

"might broaden the authority of plans to impose suspensions beyond that contemplated by Congress" [CA.Op.p.20;Ap.36],

and because the

"interpretation of the phrase 'an employer who maintains the plan' in section 203(a)(3)(B)(i) [29 U.S.C. §1053(a)(3)(B)(i)] should be consistent with the meaning given to that phrase as used in other sections of Part [sic] of Title I of the Act". [CA.Op.p.16;Ap.28-29].

E. Improper Selective Application
Of Statutes and Regulations

Disregarding the fact that there was a 1976 final regulation defining the "employer who maintains the plan", the Court of Appeals opinion states:

"the basic premise upon which the district court's decision rests *** is that the definition of 'employee' of an 'employer who maintains the plan' was settled law in 1979, circumscribed by the apparently plain meaning of those words, further defined by the controlled group concept of §414. We disagree with that premise." [CA.Op.p.14;Ap.25].

In support of this argument the Court of Appeals quotes the DOL's comments in 43 FR 59098 (12/19/78), and references 29 CFR §2530.203-3 to the effect that 29 CFR §2530 "presents a body of interdependent provisions" and the meaning of the phrase

"employer who maintains the plan" should be consistent with its meaning in other sections of ERISA. The court further quotes with emphasis:

"the Department believes that it is appropriate to include employers described in §2530.210(d) and (e) as employers maintaining the plan for purposes of suspension of benefits".
[CA.Op.p.16;Ap.29].

The referenced regulation is 29 CFR §2530.210, issued December 28, 1976, entitled "Employer or employers maintaining the plan", and provides in paragraph (b):

"Section 210 of the Act [29 U.S.C. §1060] and sections 413(c), 414(b) and 414(c) of the Code [26 U.S.C. §§413(c), 414(b) and 414(c)] provide rules applicable to sections 202, 203 and 204 of the Act [29 U.S.C. §§1052, 1053 and 1054] and sections 410, 411(a) and 411(b) of the Code, [26 U.S.C. §§410, 411(a) & 411(b)] for purposes of determining who is an 'employer or employers maintaining the plan' and, accordingly, what service is required to be taken into account in the case of a plan maintained by more than one employer. Paragraphs (c) through (e) of this section set forth the rules for determining service required to be taken into account in the case of a plan or plans

maintained by controlled groups of corporations * * *." 29 CFR \$2530.210(b). [Emphasis supplied herein and throughout this Petition unless otherwise indicated].

Since the definition of "employer maintaining the plan" for accrual of service for benefit purposes had been in effect since 1976, it is not clear how the above-referenced quotation substantiates the Court of Appeals opinion that such a definition was not settled law in 1979. Neither is it clear how any different definition (for the suspension of benefit purposes or otherwise) would be in accord with the DOL's opinion that the interpretation of the phrase should be consistent with the meaning given in other sections of ERISA. It is also unclear as to why Bell, on March 5, 1979, would have objected to the inclusion by reference of this definition of the "employer who maintains the plan" in the DOL's proposed regulation, if Bell was then in compliance with the earlier and

then existent 1976 DOL regulation. [See: CA.Op.pp.17-18;Ap.31].

The Court of Appeals disingenuously urges that, since AT&T as the Bell representative, requested the DOL to issue a regulation that would broaden the authority of pension plans to impose suspensions beyond that contemplated by Congress, then the law on forfeitability was "unclear" and "in a state of flux". [CA.Op.pp.17,19,22&24;Ap.30,34,40&43].

The Court of Appeals determined that Bell could unilaterally take advantage of the "confusion" that Bell generated so as to involuntarily retire Caldwell, irrespective of the then existing law. [CA.Op.p.17-18;Ap.31-33].

The ADEA final regulation in effect at the time of Caldwell's involuntary retirement provides at 29 CFR §1625.12(b):

"Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that

every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption must be narrowly construed."⁹

Caldwell does not agree with the Court of Appeals' conclusion that the law was "unclear" and "in a state of flux"; however, assuming arguendo the correctness of its conclusion, then the Court of Appeals has chosen to ignore the mandate of the ADEA regulation that every element must be clearly and unmistakably met. Obviously, if it is "unclear" as to what are the elements that determine a bona fide executive, as urged by the Court of Appeals, then it would be impossible to show that the "unclear" elements had been "clearly met". If this were so, Bell should not have invoked the executive exception and retired Caldwell. The

9 Numerous courts have held that the statutory exceptions to the ADEA are to be narrowly and strictly construed. See: Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 (CA7 1983), and cases cited therein.

Court of Appeals should have so ruled.

The Court of Appeals and District Court correctly noted that the bona fide executive exception in the ADEA [29 U.S.C. §631(c)] was inextricably united with 26 U.S.C. §411(a)(3)(B) and 29 U.S.C. §1053(a)(3)(B). [CA.Op.p.13;Ap.23]. Such a linkage was clearly established by the final EEOC regulation issued on November 21, 1979, nine days prior to Caldwell's involuntary retirement. 29 CFR §1625.12(k)(1).¹⁰ The comments accompanying the final regulation noted: (1) it was based on requests from commentators "to reconcile the proposed interpretation with section 411(a)(3) of the Code (26 U.S.C. §411(a)(3))" [44 FR 66796]; (2) the Commission "has chosen to

10 "The annual retirement benefit must be 'nonforfeitable.' Accordingly, the exemption may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree * * *. For example, where a plan contains a provision under which benefits
(FOOTNOTE CONT'D NEXT PAGE)

adopt these section 411(a)(3) exceptions to its interpretation" [44 FR 66796]; (3) the final regulation was prepared under the direction of the DOL with the assistance of the Office of the Solicitor and the concurrence of the Office of the General Counsel of the EEOC [44 FR 66797]; and (4) it was issued by the EEOC [Id.,] since that Commission had assumed responsibility and authority for enforcement of the ADEA as a result of §2 of the Reorganization Plan No. 1 of 1978. [92 Stat. 3781; 5 U.S.C., app.1; 44 FR 66791].

However, despite all of the foregoing, the Court of Appeals for some inexplicable reason simply stated in its opinion:

(FOOTNOTE CONT'D FROM PREVIOUS PAGE)

would be suspended if a retiree * * * obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits are discontinued or suspended for reasons permitted under §411(a)(3) of the Internal Revenue Code." 29 CFR §1625.12(k)(1).

"The extent of that linkage, and whether the EEOC intended to be potentially less restrictive in its interpretation of §631(c) of the ADEA than §411(a)(3) of the Code, is not clear from the specific language used by the Agency."
[CA.Op.p.13;Ap.23-24].

The agency's language [29 CFR §1625.12(k)(1)] states "the exception may not be applied to any employee subject to plan provisions which could cause the cessation of payments", and the referenced statute [26 U.S.C. §411(a)(3)] provides that the pension benefits are forfeitable if the plan contains suspension provisions other than those permitted in 26 U.S.C. §411(a)(3). Despite the foregoing, the Court of Appeals dismisses these clear statutory and regulatory requirements as "technical" and immaterial and adopts Bell's argument that, since Caldwell has not actually forfeited his benefits by securing employment with one of the interchange companies, he has not established that

Bell's plan provisions were subject to an impermissible forfeiture.

[CA.Op.p.9;Ap.16]. The District Court held contrary, stating: —

"By choosing the word 'forfeitable', Congress imposed a requirement of certainty in the pension benefits of executives subject to early retirement. It did not require those executives who were forced from their jobs before attaining the age of 70 to actually endure a forfeiture of their pension in an attempt to establish that their early retirement was a violation of the ADEA." [8/20/82, DC.Op.p.4;Ap.91].

F. Appellate Court Rationalization

The Court of Appeals adopted an inaccurate statement by Bell to the effect that Bell

"applied for and received a favorable determination letter dated July 11, 1979 from the IRS to the effect that the plan, as amended, was in compliance with §401, et. seq., of the Code, including §411". [CA.Op. p.23;Ap.41].

In its eagerness to rationalize its decision, the Court of Appeals then stated that the IRS was charged with the "supervision" of 26 U.S.C.

§411(a)(3)(B). [CA.Op.p.23;Ap.42]. The IRS in 26 CFR §1.411(a)-4(b)(2), issued August 22, 1977, acknowledged the DOL's responsibility for this section of the Code. Under §§101(a) & (b) of the Reorganization Plan No. 4 of 1978, the Secretary of Labor retained exclusive authority to issue "regulations, rulings, [and] opinions" on 29 U.S.C. §1053(a)(3)(B) [ERISA] and on 26 U.S.C. §411(a)(3)(B) [Code]. 92 Stat. 3790 & 3792; 5 U.S.C., app. 1. Furthermore, the opinion letter [Ap. 187-188] references no statutory provisions whatever, much less "§401, et. seq." It solely provides that "we have made a favorable determination on your application"; however, the application was not part of the record. Therefore, the Court of Appeals' decision was based on what Bell alleged the letter approved, and not the application itself. In another weak attempt to justify Bell's noncompliance with the law, the Court of

Appeals boldly states that "the reciprocity of benefits program was inherently pro-employee" [CA.Op.p.24;Ap.44]. The Court of Appeals failed to recognize that the interchange agreements require that in order for an employee's service to be transferred between the companies that service must be continuous, i.e., without even a one day break in service. [Ap.191-192]. This was an unlikely event, except for a management arranged transfer. However, ERISA and Code provisions for crediting an employee's service after a break in service are considerably more liberal. 29 U.S.C. §1052(b) & 26 U.S.C. §410(a)(5).

II. BONA FIDE EXECUTIVE ISSUE IMPROPER FOR SUMMARY JUDGMENT DISPOSITION

The ADEA, in 29 U.S.C. §626(c)(2) provides:

"a person shall be entitled to a trial by jury of any issue of fact *
* * * regardless of whether equitable relief is sought by any party in

such action."

In the Complaint [Ap.147], Caldwell demanded a jury trial pursuant to Rule 38(b), F.R.Civ.P. Caldwell was entitled to a jury trial on all contested factual issues. U.S. Const. Amend. VII; Lorillard v. Ponz, 434 U.S. 575, 585, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978). The "bona fide executive" issue was presented to the District Court by Bell's motion for summary judgment filed on March 11, 1982. [Ap.162]. The District Court originally denied the motion. [8/20/82, DC.Op.pp.1&6;Ap.85&95]. Unexpectedly, almost 4 years later on May 22, 1986, the District Court, with no intervening hearing, evidence, argument or briefs, reversed itself, sua sponte, and sustained Bell's March 11, 1982, motion. [5/22/86, DC.Op.pp.3&4;Ap.76-77].

The Court of Appeals affirmed the summary judgment, justifying its ruling in this ingenious manner:

"One of Caldwell's primary contentions is that the question of whether an employee is an executive is inherently factual and not a proper subject for summary judgment. However, we note that none of the material facts regarding Caldwell's employment position are in dispute. Therefore, the only question at hand is what was intended by the phrase 'bona fide executive.' It is well established that questions of statutory construction and congressional intent present questions of law properly resolved by summary judgment." [CA.Op.pp.7&8;Ap.12-13].

The material facts regarding Caldwell's employment were in dispute. The Court of Appeals, on the basis of Caldwell's job position description, decided that Caldwell met the definition of "executive" in the DOL regulation set forth in 29 CFR §541.1.¹¹ [CA.Op.p.5;Ap.8-9]. Thereupon, the Court of Appeals concluded that Caldwell's job fell within the criteria set forth in the

11 This regulation promulgated under the Fair Labor Standards Act was not the sole test of a bona fide executive. There were additional requirements imposed by the EEOC. 29 CFR §1625.12(d).

EEOC regulation [29 CFR §1625.12(d)(2)] and quoted that regulation [CA.Op.p.6;Ap.9-10], and the District Court opinion with which it concurred. [CA.Op.p.7;Ap.11]. However, a comparison of the District Court's description of Caldwell's job and the description in the EEOC regulation showed an absence of any commonality in the description or terminology. The Court of Appeals did not (nor did the District Court) identify with specificity the particular category in the regulation which they perceived was applicable to Caldwell's job on the basis of the descriptive terms in the opinion. In fact, a relationship between the requirements in the regulation and the so called "material facts" did not exist, except for inferences that both lower courts have applied to both disputed and undisputed "material facts".

While it may be true that many of the underlying or historical facts regarding

Caldwell's "employment position" were not in dispute, the ultimate fact as to whether Caldwell was a bona fide executive was a factual issue hotly disputed. When the inferences to be drawn from agreed facts are divergent, this is then a question for the jury to weigh. Macy v. Trans World Airlines, Inc., 381 F.Supp. 142, 145 (D.C. Md. 1974); Patton v. Conrad Area School District, 388 F.Supp. 410, 418 (D.C. Del. 1975); Carpenter International, Inc. v. Kaiser Jamaica Corp., 369 F.Supp. 1138, 1143 (D.C. Del. 1974). The burden of proof that Caldwell was a bona fide executive was on Bell, as the movant. Adkicks v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Furthermore, 29 CFR §1625.12(b) even goes further and placed the burden on Bell, as the employer, to establish that Caldwell's alleged bona fide executive status was "clearly and unmistakably met".

Though it may be accurate, as stated by the Court of Appeals, that the phrase "bona fide executive" was subject to some sort of statutory construction by the trial judge, the APPLICATION of the FACTS [and INFERENCES to be drawn from those facts] to the trial judge's "statutory construction", is solely within the province of the jury.

There was admittedly never any document issued by Bell advising Caldwell that he was a bona fide executive under the ADEA until Bell advised Caldwell that he would be forcibly retired. [Ap.150-152]. This advise occurred on October 11, 1979, less than two months prior to Caldwell's retirement. Therefore, solely jury questions concerning Bell's virtually simultaneous labelling of plaintiff as an executive, would involve such issues as motive, intent, Bell management's state of mind and credibility. These are all jury functions

to be weighed and determined at trial, not on a motion for summary judgment.

Certainly the District Court weighed these inferences and improperly usurped the function of the jury. This Court, in announcing the standard to apply in determining when a case cannot be decided on summary judgment, has stated:

"[A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First National Bank of Arizona vs. Cities Service Co., 391 U.S. 253, 288-289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d. 569 (1968).

This Supreme Court has further stated:

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to

be believed, and all justifiable inferences are to be drawn in his favor." Id., at 477 U.S. 255, 106 S.Ct. 2513.

Pursuant to the directives set forth in Anderson, supra., 477 U.S. 252-255, 106 S.Ct. 2512-2513, the trial court can exclude an issue from the jury process, if it determines that the evidence could only support Bell's position, i.e., the jury would not have to weigh any evidence, as the only inference available for the jury would be that Caldwell was a bona fide executive. In making such a determination, the District Court would have to determine, based on all evidence submitted both by Bell and Caldwell, that the only inference that could be made by the finder of fact was that Caldwell was a bona fide executive. Furthermore, because of 29 CFR §1625.12(b), in so finding, the finder of fact would have to determine that Bell proved such by "clear and convincing" evidence. Anderson,

supra., 477 U.S. 255, 106 S.Ct. 2514.

Caldwell respectfully submits that Bell's evidence failed to even meet the "beyond a preponderance" of the evidence rule, much less the more stringent "clear and convincing" evidence standard. In other words, not only could a jury have determined from the facts before it that Caldwell indeed was not a bona fide executive, but it certainly could have determined that Bell had failed to meet its burden of proof that Caldwell was a bona fide executive, under the clear and convincing evidence criterion.

A portion of the evidence on the issue which Caldwell expected to present to a jury was presented to the District Court prior to its denial of Bell's motion for summary judgment. However, because the District Court, sua sponte, reversed its decision almost four years later, no opportunity was ever given to present additional and material evidence on the

issue. Of course, the evidence tendered to the District Court must be viewed most favorable to the party opposing the motion for summary judgment.

"[o]n summary judgment the inferences to be drawn from the underlying facts contained in (the moving party's materials) must be viewed in the light most favorable to the party opposing the motion." [Citation omitted]. Adkicks v. S.H. Kress & Co., 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970).

If Caldwell had been permitted a jury trial, he would have established Bell's perception of him in the decision making process within the corporate structure in 1979. The evidence would have also reflected:

(1) Bell, with headquarters in St. Louis, Missouri, had 95,273 employees and Caldwell was not an officer or officer level employee. [Ap.182,190&196.C.A.p.8; Ap.14].

(2) Only one officer was located in Oklahoma and that officer (Mr. Parsons)

was the head of the Oklahoma regional operation, which consisted of about one-tenth of Bell's total operations. [Ap.183].

(3) Caldwell (one of 127 salary grade 5 level employees) held the title of general manager-comptroller, Oklahoma. He reported to Mr. Schoonmaker, Director-Comptroller's Operations in St. Louis, who in turn, reported to Mr. Bailey, Vice President-Finance and Comptroller. Mr. Bailey was one of fifteen persons who occupied positions bearing the title of Vice President, and he, in turn, reported to Mr. Barnes, President of Bell. [Ap.182-186&195-208].

(4) In discovery, it was determined that a Vice President of AT&T (the then parent of Bell) stated in a presentation in May 1978, just after the enactment of the "bona fide executive" exception to the ADEA, that:

"probably all current 5th level

employees and perhaps later some 4th level individuals will qualify * * * Since the \$27,000 figure is non-escalating, we will have in the future an increasing number of persons with a pension of that amount".

The presentation concluded with the statement that it was the intention of AT&T to

"utilize the \$27,000 executive exception fully. We may, however, at some point be challenged on our approach". [Ap.165,169-170].

From the immediately foregoing statements alone, the jury could properly conclude that it was the intention of Bell management to illegally retire all management employees at age 65 under the "bona fide executive" exception who had an annual pension of \$27,000, whether or not they were actually bona fide executives. This policy was enunciated despite the fact that the House Conference Committee Report provided:

"The conference agreement make clear that an employee will not be subject to mandatory retirement solely because he or she meets the retirement income test. The employee must also be a bona fide executive or high policymaking employee." H.

Conf. R. No. 95-950, 95th Cong., 2d Sess., p. 9, reprinted in 1978 U.S. Code Cong. & Ad. News 528, 530.

(5) In order to take full advantage of the \$27,000 pension provision of the exception, Bell avoided specificity in defining the employee who was a bona fide executive. Bell's pension plan simply provided in Sec. 4.1 (g), the following:

"Mandatory retirement age"- "Each employee shall be retired from active service, whether or not he is eligible for a pension, not later than the last day of the month in which his seventieth birthday occurs except as otherwise provided by applicable state law and except those employees referred to in section 12(c)(1) of the ADEA who shall be retired not later than the last day of the month in which the sixty-fifth birthday occurs * * *"
[Ap.178].

(6) In discovery, it was determined that internal guidelines dated November 6, 1978, were used by members of the Benefit Committee who were responsible for determining whether the employee fell within the bona fide executive exception. The guidelines provided that "generally

all fifth level employees and above will be covered under the Executive Exemption". [Ap.189]. Furthermore, in answering interrogatories Bell stated that the determination "must be done on a case by case basis". [Ap.157].

(7) Employees were not aware of these internal guidelines as evidenced by the answer to discovery of Bell to furnish a copy of each and every document issued by Bell during the three year period prior to November 30, 1979, in which Bell advised all salary grade 5A employees that they were considered by Bell to be a bona fide executive or in a high policy making position or words of similar import. Bell responded: "There are no such documents". [Ap.148-151].

(8) In discovery, Bell admitted that only on October 11, 1979, and November 20, 1979, (seven days after the benefit committee had already retired Caldwell) did Bell ever give Caldwell any written

notification that he was considered to be a bona fide executive under the ADEA. [Ap.148-155].

Prior to the District Court's decision to reverse its previous order and sustain Bell's motion for summary judgment on the bona fide executive issue (May 22, 1986), Caldwell, as a stockholder in Bell, received a Notice of Bell's 1985 Annual Shareholders' Meeting and a Proxy Statement. The notice stated: "Under the management pension plan, retirement is mandatory at age 65 for officers and other executives." The notice further advised, in a footnote, that on January 22, 1985, the Board of Directors requested that Mr. Barnes continue as Chairman and Chief Executive Officer of Bell through the end of 1989. The footnote also advised that Mr. Barnes would reach the normal retirement age of 65 in 1986. [Ap.193-194].

From this it would appear that the

bona fide executive exception to the nondiscrimination requirements of the ADEA and which was incorporated into Bell's plan as a mandatory requirement applicable to all employees referred to in 29 U.S.C. §631(c)(1), is being applied as an "optional term of the plan". In such a case, it permits individual, discretionary acts of discrimination, which do not fall within the 29 U.S.C. §623(f)(2) exception, and therefore becomes a subterfuge to evade the purposes of the ADEA. Public Employees Ret. Sys. of Ohio v. Betts, supra., at p. 2867. While Bell's Board of Directors may have had the authority to authorize the deletion of the 29 U.S.C. §631(c)(1) exception from the plan, it did not have the authority to authorize the optional application of said bona fide executive exception in the plan.

29 CFR §860.120(c), entitled Costs and benefits under employee benefit plans,

issued May 25, 1978, provides:

"Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which does not fall within the section 4(f)(2) [29 U.S.C. §623(f)(2)] exception."

We submit that the above facts constitute sufficient evidence from which a jury could properly infer and find that not only was Bell engaging in a subterfuge to evade the purposes of the ADEA, but also that Caldwell was not even considered by Bell to be one of its executives until it became necessary to do so in order to retire him at age 65, and, at that time, Caldwell was in fact neither such an executive of Bell, nor one of its "very few top level employees", as referenced in 29 CFR §1625.12(d)(2).

The foregoing recitation of facts also precludes Bell from establishing by clear and convincing evidence that Caldwell was a bona fide executive. CERTAINLY there was, at the very least, a question of fact as to whether Bell had so established such under the stringent clear and convincing evidence standard. Under those circumstances a determination of the issue by summary judgment was not proper. Anderson, supra.

III. DENIAL OF LEAVE TO AMEND COMPLAINT

Under the ADEA, effective January 1, 1979, it became unlawful for Caldwell to be retired at age 65. The only applicable exception was if Bell's pension plan provided for a bona fide executive exception pursuant to 29 U.S.C. §631(c)(1). Of course, Bell advised Caldwell that he was being retired under the terms of Bell's plan. [Ap.152&178]. Therefore, such an exception, of necessity, must have been incorporated into

the pension plan.

A pension plan must contain a procedure for its amendment. 29 U.S.C. §1102(b)(3). Bell's pension plan authorizes the "committee" (Benefit Committee) to make changes in the plan with the consent of Bell's president and subject to the approval of Bell's Board of Directors. [Ap.181]. The plan also provides that the only exception to the requirement of Board approval is in those instances when "in the opinion of the committee" the changes "are dictated by requirement of federal or state statutes * * * or authorized or made desirable by such statutes". Caldwell contends that the "opinion of the committee" is controlling and that opinion is set forth clearly and unquestionably in the minutes of the December 20, 1978, committee meeting as follows:

"On recommendation of the Chairman,
it was voted that the Chairman be
authorized to send the President a

letter, a copy of which is attached, recommending the changes in the Plan for Employees' Pension, Disability Benefits and Death Benefits, with the request that the President submit the changes to the Board of Directors for consideration." [Ap.173]

Caldwell has discovered evidence that substantiates that neither the president nor the chairman of the Benefit Committee ever submitted these changes to the Board for approval, even though the Benefit Committee specifically conditioned the amendment of the plan on the approval of Bell's Board of Directors. [Ap.175-177]. Bell never contested below Caldwell's assertion that the Benefit Committee failed to obtain the required Board approval. Therefore, by "sidestepping" Bell's Board of Directors, certain executives of Bell were able to obtain an amendment to Bell's Pension Plan in violation of the terms of the plan and even in violation of Bell's fiduciary duties owed to the plan's participants. This

was in violation of the directive set forth in 29 U.S.C. §1104(a)(1)(D). Caldwell and other similarly situated plan participants were deprived of a full review of this amendment by Bell's Board of Directors and such was a condition precedent for the implementation of the Plan amendment required to justify Caldwell's early retirement under 29 U.S.C. §631(c)(1).

Without there being a provision in Bell's plan for a bona fide executive exception to the ADEA's protection to age 70, 29 U.S.C. §631(c) has no applicability to Bell's retirement of Caldwell because, the pension plan itself must provide for the retirement of a bona fide executive at age 65 along with his right to a nonforfeitable annual benefit. The pension plan and 29 U.S.C. §623(f)(2) both recognize this requirement. Bell recognized this requirement, but was in such a rush to implement the proposed

plan modification prior to the January 1, 1979, effective date of the ADEA amendment, that it failed to obtain its Board of Directors' approval as required under the plan and as required by the plan's Benefit Committee.

Upon discovery, during this action, of the aforesaid facts, Caldwell sought to allege that the January 1, 1979, amendment to Bell's pension plan was not properly adopted, and therefore Bell could not utilize the bona fide executive exception to the ADEA. This issue was initially raised in Caldwell's Request to File Additional Amendments, said instrument being filed in the District Court on January 26, 1982. [Ap.158]. The District Court initially and incorrectly ruled that Caldwell's motion had been rendered moot. [8/20/82, DC.Op.p.6;Ap.95]. However, Caldwell renewed his request by Motion to File Additional Amendments, which was filed in

the District Court on May 3, 1984. [Ap.163]. This motion was likewise denied by the District Court in its memorandum opinion and order filed May 22, 1986. [5/22/86, DC.Op.p.7;Ap.82-83]. The Court of Appeals, without explanation, simply found no abuse of discretion. [CA.Op.p.26;Ap.47].

Rule 15(a), F.R.Civ.P. requires the trial court to allow a party to amend his pleadings when justice so requires. The District Court twice denied Caldwell's request to amend his Complaint, and both times the District Court denied the request but gave no reason or justification for refusing to allow the amendment. It is reversible error for a court to abuse its discretion and violate Rule 15(a), F.R. Civ.P. In that regard, the United States Supreme Court has held that an

"outright refusal to grant the leave without any justifying reason appearing for the denial is not an

exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules",

and therefore reversible error. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d. 222 (1962).

In summation, and irrespective of Caldwell's status as a bona fide executive or the status of his pension plan benefits as nonforfeitable, unless Bell properly enacted an amendment to its pension plan prior to the retirement of Caldwell, Bell is unable to rely upon the bona fide executive exception for Caldwell's forced early retirement. By prohibiting Caldwell from amending his Complaint to include such pertinent allegations and thereby proving them at a trial, the District Court abused its discretion. The Court of Appeals' opinion in finding "no abuse of discretion by the district court", is also in conflict with Foman v. Davis, supra.

Bell's activities in this regard are especially pernicious when considered in conjunction with Bell's illegal policy of picking and choosing which alleged bona fide executives it will discriminate against and subject to its early retirement directives. This policy of Bell has been described heretofore and is evidenced in its "Notice of 1985 Annual Meeting and Proxy Statement". [Ap.193-194]. Under the recent Supreme Court case of Firestone Tire and Rubber Co. v. Bruch, 109 S.Ct. 948, 949 (1989), Bell's activities in this regard are not subject to an arbitrary and capricious standard. Bell, as plan fiduciary, in amending its pension plan, is required to comply with the plan's terms. [29 U.S.C. §1104(a)(1)(D)].

CONCLUSION

Caldwell respectfully submits that the United States Court of Appeals for the Tenth Circuit has decided each of the

federal questions set forth at the beginning of this Petition in a way in conflict with applicable decisions of this Court. In particular, the Tenth Circuit determined that Bell did not have to comply with the nonforfeitable pension benefit precondition for implementation of the bona fide executive exception permitting the early retirement of Caldwell under the ADEA. In doing so, the Court of Appeals failed to apply the clear wording of the pertinent statutes and regulations, in violation of this Court's decisions in Public Employees Ret. Sys. of Ohio vs. Betts, supra., and Southeastern Community College v. Davis, supra. Secondly, the Tenth Circuit failed to rule that Caldwell was entitled to a jury trial, in violation of this Court's decisions in Lorillard vs. Ponz, supra., Adkicks vs. S. H. Kress & Co., supra., First National Bank of Arizona vs. Cities Service Co., supra.

and Anderson vs. Liberty Lobby, Inc., supra. Lastly, the Tenth Circuit failed to hold that it was an abuse of discretion for the District Court to refuse Caldwell permission to amend his Complaint after discovery of facts that resulted in nullifying Bell's attempted compliance with one of the preconditions to a valid early retirement of Caldwell, in conflict with this Court's decision in Foman vs. Davis, supra.

Because of the foregoing, Caldwell prays that this Court grant this instant petition for certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Joseph A. Claro, a member of the Bar of this Court hereby certifies that on the 30~~th~~ day of August, 1989, three copies of the above and foregoing instrument were deposited in a United States mail box, with first-class postage prepaid, and addressed to counsel of record for respondent, at said counsel's post office address as follows:

Mona S. Lambird, Esq.
Andrews, Davis, Legg,
-Bixler, Milstein and Murrah
500 West Main
Oklahoma City, OK 73102

Respondent is the only party required to be served herewith.

Joseph A. Claro

89-380

Supreme Court, U.S.

FILED

AUG 30 1989

JOSEPH F. SPANIEL
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CARL P. CALDWELL,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CARL P. CALDWELL,)	[FILED
)	U.S. Ct. App.
Plaintiff/Appellant/	)	10th Cir.
Cross-Appellee/	)	April 24, 1989
Appellee,	)	Robert L. Hoecker
	)	Clerk]
v.)	
)	
SOUTHWESTERN BELL	)	Nos. 87-2647
TELEPHONE COMPANY,	)	87-2711
	)	88-1332
Defendant/Appellee/	)	(W.D. Okla.)
Cross-Appellant/)	
Appellant.	)	(D.C. No. CIV-
	)	81-114T)

ORDER AND JUDGMENT*

Before **MOORE** and **ANDERSON**, Circuit Judges,
and **BROWN**, ** Sr. District Court Judge.

This is an age discrimination case
brought by Carl P. Caldwell under the Age

*This order and judgment has no
precedential value and shall not be
cited, or used by any court within the
Tenth Circuit, except for purposes of
establishing the doctrines of the law of
the case, res judicata, or collateral
estoppel. 10th Cir. R. 36.3.

** Honorable Wesley E. Brown, Sr.
Judge, U.S. District Court, for the
District of Kansas, sitting by
designation.

Discrimination in Employment Act (the "ADEA"), 29 U.S.C. §621, et. seq., against his former employer, Southwestern Bell Telephone Company ("Bell"), following his involuntary retirement by Bell, solely for reasons of age, at age sixty five. The parties have filed cross-appeals from various rulings and the judgment of the district court in Caldwell's favor in the amount of \$322,386.39, together with costs and post judgment interest. Although many issues are raised, the threshold question both in the district court and here is whether Caldwell's retirement falls within the bona fide executive exception to the age limit established by the ADEA, 29 U.S.C. §631(c)(1). At times relevant hereto¹ that section provided:

(c) Bona fide executives or high policymakers

¹ The section has subsequently been amended in minor ways not pertinent to this opinion.

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, or the employer of such employee, which equals, in the aggregate, at least \$27,000.

The district court granted summary judgment against Caldwell on the question of Caldwell's status as an "executive" of Bell within the meaning of that term as used in the bona fide executive exception. We affirm that ruling. The district court, however, ruled that the bona fide executive exception did not apply to Caldwell because his entitlement to a pension benefit immediately upon retirement was theoretically forfeitable under the provisions of Bell's pension plan, in violation of the nonforfeitability

requirement of the exception. The summary judgment against Bell on that issue is the sole basis for liability upon which the judgment below rests. Bell appeals that summary judgment, and we reverse.

With respect to the single basis for liability in this case, upon which we reverse the district court, it appears that this case presents a non-recurring issue since it is confined to periods prior to 1982.

I.

Caldwell contends that a genuine issue of fact exists as to whether he was an executive within the meaning of section 631(c)(1), thus requiring a reversal of the district court's summary judgment on the point. Our review of the issue is governed by settled standards. The facts must be viewed in a light most favorable to Caldwell, the nonmoving party, Setliff v. Memorial Hospital of

Sheridan County, 850 F.2d 1384, 1391-92 (10th Cir. 1988); McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988), but the mere existence of some factual dispute is not necessarily enough. There must be a genuine issue of material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If the record, viewed favorably to Caldwell, establishes that the point in question could not survive a motion for a directed verdict, then summary judgment must be upheld. Celotex Corp. v. Catrett, 477 U.S. at 322-23; Anderson v. Liberty Lobby, Inc., 477 U.S. at 251-52; Lake Hefner Open Space Alliance v. Dole, No. 87-1381 at 7-8, 1989 U.S. App. Lexis 3773, (10th Cir. March 28, 1989).

Caldwell began his employment with Bell in 1935 in Dallas as a file clerk. He was promoted to toll billing

supervisor, his first management position, in 1940. After various other management level positions he was promoted in 1964 to the position of General Accounting Manager, which was the department head of the accounting department of Bell for the State of Oklahoma. Although his title was changed to General Manager-Comptroller in 1978, he basically remained in this position until his retirement in 1979. See Addendum to Answer Brief of Appellee and Brief in Chief of Cross Appellant at Tab 11, pp. 3, 7.

Caldwell had been at the salary grade level 5A, the highest management level which is also referred to as the "department head" level, since 1964. The annual expense budget for his position was \$7.5 million (in 1976). At the time he was retired, 441 employees reported directly to him. There were only 8 other employees at the fifth level in Oklahoma

and only one employee in Oklahoma that was at a higher level than Caldwell. He was among the top .5 percent of management in Bell and among the top .4 percent of management in Bell's Oklahoma operations. See Id. at 6-8, 16-22, and charts and materials at end of brief. Caldwell does not contest any of the above facts.

A job position description, which was signed and concurred in by Caldwell, states, inter alia, that Caldwell's position included statewide responsibility for all aspects of comptroller operations, and for directing all matters relating to personnel administration, including the selection, training and development of all management employees. Id., Exhibit A. The job position description indicates that Caldwell had a great amount of responsibility as well as discretion: "The incumbent has very little direct guidance in the operations

of his organization. Exerts wide discretion in administering the job and determining where personnel should be utilized to achieve the most effective and productive results." Id.

Pursuant to its authority in 29 U.S.C. §628 to promulgate rules and regulations to carry out the ADEA, the Equal Employment Opportunity Commission (EEOC) issued 29 C.F.R. § 1625.12 entitled "Exemption for Bona Fide Executive or High Policymaking Employees," which became effective November 21, 1979. This "final interpretation" discusses what is meant by "executive." To qualify, the employer must first show that the employee satisfies the definition of "executive" in 29 C.F.R. § 541.1, that is, in pertinent part, that the individual is an employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees . . . ; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent . . . of his hours in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section

Caldwell admitted in his deposition to being an "executive" under these standards. The EEOC's final interpretation further provides that the employee must also meet the criteria established in the examples from H.R. Rep. No. 950, 95th Cong., 2d Sess. 9, reprinted in 1978 U.S. Code Cong. & Admin. News 528, 531, see 29 C.F.R. § 1625.12(d)(2), which in pertinent part, provides:

Typically the head of a significant and substantial local or regional operation of a corporation, such as a major production facility or retail establishment, but not the head of a minor branch, warehouse

or retail store, would be covered by the term "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.

The heads of major departments or divisions of corporations [would also be covered].

In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conferees intend the definition to cover such employees if they possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

29 C.F.R. § 1625.12(d)(2) states that the exemption is only applicable to "a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business" and not to "middlemanagement employees."

Upon close examination of the briefs and other materials before the court, it is apparent that the district court did

not err in granting summary judgment in favor of Bell on the issue of whether Caldwell was a "bona fide executive" pursuant to these criteria. As the district court commented:

The definition contained [in the various regulations and interpretations described above] unmistakably applies to the plaintiff based upon the facts which are contained in the record. [Caldwell] was department head of the accounting department for Oklahoma. He was considered by [Bell] to be at the fifth management level which was the highest level of management of the department heads in Oklahoma. Management levels three and four, as well as all 441 employees of the department, reported directly to him. Based upon the job description, written by [Caldwell] himself, he exerted wide discretion in administering and deciding where to utilize personnel most effectively and productively. He was also responsible for selection, training, and monitoring the progress of all management employees. Based upon these undisputed facts, as a matter of law, [Caldwell's] job fell within the "bona fide executive" exception of the ADEA.

Memorandum Opinion and Order at 3-4 (May 22, 1986). We are in complete agreement with the district court. We view the

applicable standards and guidelines discussed above as fairly describing and applying to Caldwell's position with Bell for at least the two years immediately preceding his retirement in November 1979. In addition to the reasoning of the district court we note that because Caldwell was among the top .5 percent of management of Bell (and among the top .4 percent of Bell's Oklahoma operations) that he was indeed one of the "top few employees" who exercise substantial executive authority (i.e. wide discretionary powers) over a significant number of employees. See 29 C.F.R. § 1625.12(d)(2).

Our view is not altered by the facts or theories advanced by Caldwell. One of Caldwell's primary contentions is that the question of whether an employee is an executive is inherently factual and not a proper subject for summary judgment. However, we note that none of the

material facts regarding Caldwell's employment position are in dispute. Therefore, the only question at hand is what was intended by the phrase "bona fide executive." It is well established that questions of statutory construction and congressional intent present questions of law properly resolved by summary judgment. State of Okla. ex rel. Dept. of Human Services v. Weinberger, 741 F.2d 290, 291 (10th Cir. 1983); Union Pacific Land Resources Corp. v. Moench Investment Co., 696 F.2d 88, 93 (10th Cir. 1982), cert. denied, 460 U.S. 1085 (1983). Even if the question were "factual" as Caldwell argues, summary judgment would nonetheless be appropriate because, as indicated above, all the relevant facts are undisputed and therefore there is no genuine issue of fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 247-48.

Caldwell argues that he was not one of

the 38 "officers" or "officer-level" personnel of Bell, was not listed in the "executive" section of the Bell telephone directory, and that Bell failed to produce any documents in which Bell advised employees of his salary grade level that they were bona fide executives. These technical arguments simply do not conform to the reality of the situation and to the standards and guidelines set forth in 29 C.F.R. § 1625.12 which make it clear that it is the job content and responsibility compared within the company itself and the marketplace, and not the job title or whether the employee in question is informed of his "executive" status, which is determinative.

Caldwell argues that because of his job was to "administer" his department in accordance with "instructions" from his superiors in St. Louis that he is not an executive. However, as discussed above,

Caldwell's position "has very little direct guidance." He merely had to operate "within the policies established at the officer level within the company." SJ Brief, Exhibit A. Caldwell nonetheless had "substantial executive authority." Caldwell's other arguments are equally meritless.

Giving full weight to the standards and guidelines enumerated above, Caldwell's arguments fall far short of overcoming the central realities of Caldwell's position of authority and supervisory responsibility. Whether viewed in proportion to Bell's total work force or in proportion to Bell's total work force in Oklahoma, Caldwell simply cannot be regarded as middle level management. He was in fact one of a handful of top employees in a major area, the state of Oklahoma, and held very significant supervisory and executive authority in Bell and over a large number

of employees.

II.

Section 631(c)(1) permits the compulsory retirement of bona fide executives at age sixty-five "if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension [plan] . . . of the employer of such employee . . ." Id. (emphasis added). It is conceded that Caldwell has at all times been entitled to his pension, has received all of his pension benefits, and has never faced and never will face any realistic possibility of forfeiture. However, the district court held essentially that Bell was foreclosed from using the bona fide executive exception for Caldwell or anyone else in 1979 because its pension plan violated certain technical limitations with respect to forfeitability. In other words, the district court, in essence, disqualified

the Bell plan (and the plans of other companies in the AT&T system nationwide), insofar as it attempted to make use of the bona fide executive exception, and did so for the entire period from the ADEA amendment effective in 1978 to the effective date of relevant final regulations under the ADEA on January 1, 1982, at which time the plan provisions were amended.

The dispute lies with the provision in Bell's pension plan in 1979 which required the suspension of benefit payments to a retiree during periods of reemployment within the AT&T group of companies. Caldwell has contended throughout these proceedings, and the district court held, that under the facts presented here the possibility of a suspension of payments upon reemployment within the AT&T system technically rendered Caldwell's benefits forfeitable, in violation of the statute.

The controlling facts are as follows. Beginning as early as 1913, companies within the AT&T system adopted similar but separate pension plans and provided for full reciprocity of obligations between companies in the system by means of interchange agreements. The interchange agreements enabled management employees, for instance, to transfer from company to company within the AT&T system without loss of service credits and other benefits. In other words, pension benefits were portable within the AT&T system. The participating companies were referred to as "interchange companies." The Bell plan suspended benefit payments of a retiree during the period that the retiree was reemployed by Bell or any of the other interchange companies.² There were thirty-seven of

² The plan provided:

"Regular employment with this Company or with any company with which
(Footnote -2- Cont. Next Page)

these AT&T system interchange companies at the time of Caldwell's retirement. Thirty-four of the companies were 80% or more owned by AT&T. Three were not: Rochester Telephone Company, Cincinnati Bell, Inc., and Southern New England Telephone Company. As will be explained more fully below, that fact was the critical element in the district court's determination.

Testing the Bell suspension of payments provision against the nonforfeitability requirement of § 631(c)(1) is something of a labyrinthine

(FOOTNOTE -2- CONT.)

arrangements for interchange of benefit obligations, as described in Section 9 of these Regulations, have been made directly or indirectly, shall suspend the right of a retired employee or person receiving a deferred vested pension to pension payments during the period he continues in such employment."

Section 4.6, Plan for Employees' Pensions, Disability Benefits and Death Benefits (effective 11/30/79), Reply Brief of Cross-Appellant Southwestern Bell Telephone Co., at Tab 1.

§ 631(c)(1) is something of a labyrinthine process. Several years prior to the enactment of section 631(c) the nonforfeitable pension standard appeared for various purposes and in various contexts in the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461,³ and in simultaneously enacted counterparts in the Internal Revenue Code (the "Code"). In particular, the standard of nonforfeitability with respect to pensions was built into the minimum vesting provisions of ERISA and the Code as § 203 of ERISA, 29 U.S.C. § 1053, and § 411 of the Code, 26 U.S.C. § 411. Both of those statutes specifically provide

³ To facilitate review of the ERISA provisions and comparison with the other statutory sections discussed in this opinion, we have provided citations to ERISA as codified, and not to the Act itself. In the interest of clarity, and despite the imprecision involved, this opinion will still refer to these codified sections as "ERISA."

that no forfeiture occurs within the meaning of the statute when pension benefits are suspended upon reemployment of a retired "employee" by an "employer who maintains the plan under which such benefits were being paid."

29 U.S.C. § 1053(a)(3)(B), 26 U.S.C. § 411(a)(3)(B).⁴

⁴ The statutes in question are virtually identical in wording. 26 U.S.C. § 411(a)(3)(B) provides (as does 29 U.S.C. § 1053(a)(3)(B)):

§ 411. Minimum vesting standards

(a) General rule.--A trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age

. . . .

(3) Certain permitted forfeitures, suspensions, etc.--For purposes of this subsection--

. . . .

(B) Suspension of benefits upon reemployment of retiree.--A right to an accrued benefit derived from employer contributions shall not be treated as
(FOOTNOTE CONT. NEXT PAGE)

Section 414(b) of the Code and section 210(c) of ERISA (29 U.S.C. § 1060(c)), were both enacted at the same time as the nonforfeitability sections just mentioned. These latter statutes provided further that for various sections of the Code and ERISA, including § 411 of the Code and § 203 of ERISA (29 U.S.C. § 1053), "all employees of all

(FOOTNOTE CONT. FROM PREVIOUS PAGE)

forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits--

(i) in the case of a plan other than a multiemployer plan, by the employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, the same trade or craft, and the same geographic area covered by the plan as when such benefits commenced.

The Secretary of Labor shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

corporations which are members of a controlled group of corporations (within the meaning of §1563(a)[of the Code] . . .) shall be treated as employed by a single employer." Section 1563(a) of the Code defines a controlled group of corporations, insofar as relevant here, as corporations owned by or connected to a common parent by 80% or more stock ownership.

For purposes of consistency among statutes requiring nonforfeitability of pension benefits, the Equal Employment Opportunity Commission (the "EEOC") in its "final interpretations" issued on November 21, 1979 with respect to §631(c) of the ADEA, linked §631(c) to §411(a)(3) of the Code; and, therefore, the same provision in ERISA, §203(a)(3) (29 U.S.C. § 1053(a)(3)). The extent of that linkage, and whether the EEOC intended to be potentially less restrictive in its interpretation of § 631(c) of the ADEA

than § 411(a)(3) of the Code, is not clear from the specific language used by the Agency. Until 1987 it appeared at 29 C.F.R. § 1625(k)(1), as follows:

(k)(1) The annual retirement benefit must be "nonforfeitable." Accordingly, the exception may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree or result in the reduction of benefits to less than \$27,000 in any one year. For example, where a plan contains a provision under which benefits would be suspended if a retiree engages in litigation against the former employer, or obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits are discontinued or suspended for reasons permitted under section 411(a)(3) of the Internal Revenue Code. (Emphasis added.)

Accordingly, the district court faithfully followed the trail just outlined, from §631(c)(1) of the ADEA, to §§ 411(a)(3)(B) and 414(b) of the Code. It then held that the Bell plan violated §411(a)(3)(B) of the Code because the plan provision in question was tied to

companies with reciprocal benefit plans instead of companies in a controlled group. As previously indicated, three of the thirty-seven companies in the AT&T interchange system were less than 80% owned by AT&T, and it was this point upon which the district court seized. An additional point not mentioned can be added. Section 414 of the Code refers to a single plan, whereas the AT&T interchange system was built on plans separately maintained by each company.

However, the basic premise upon which the district court's decision rests, and which Caldwell urges again on appeal, is that the definition of "employee" of an "employer who maintains the plan" was settled law in 1979, circumscribed by the apparently plain meaning of those words, further defined by the controlled group concept of § 414. We disagree with that premise. In § 411(a)(3)(B) of the Code, and § 203(a)(3)(B) of ERISA (29 U.S.C.

§ 1053(a)(3)(B)), Congress expressly delegated broad responsibility to the Secretary of Labor to promulgate regulations to carry out the purposes of those subparagraphs, including "regulations with respect to the meaning of the term 'employed.'"⁵ While the extent of that authority may be open to debate, it is clear that employers and the Department of Labor itself thought it probably included the power to place reciprocal plans within the regulations under § 411 of the Code and § 203 of ERISA (29 U.S.C. § 1053). In fact, the Department assumed it even had the power to include or exclude controlled groups of corporations from the definition of "employer who maintains the plan" for purposes of section 203(a)(3)(B) of ERISA (29 U.S.C. § 1053(a)(3)(B)). In its comments to its proposed regulations

⁵ See n.4.

published on January 19, 1981, the Department weighed the pros and cons of including controlled groups of corporations and opted to include them. See 29 C.F.R. 2530.203-3(c).⁶

⁶ The Department explained this section as follows:

C. Employment in Section 203(a)(3)(B) Service

. . . .

An "employer maintaining the plan"--non-multiemployer plans. The Act provides that, in the case of a plan other than a multiemployer plan, benefits may be suspended if a retiree is reemployed by an employer who maintains the plan under which such benefits were being paid. The Department proposed to include employers described in 29 CFR. §2530.210(d) and (3) as "employers who maintains the plan" for purposes of suspension of benefits.

Section 2530.210 generally sets forth rules for determining the employer or employers who maintain a plan. Paragraph (d) of that section requires, in effect, that under a plan maintained by one or more members of a controlled group of corporations, service with any employer which is a member of the controlled group shall be taken into account for purposes of participation, vesting, and benefit accrual. Similarly, paragraph (e)

It was simply impossible in 1979 to derive firm definitions from the language of § 411(a)(3)(B) of the Code

(FOOTNOTE 6 CONTINUED)

of that section requires, in effect, that under a plan which is maintained by one or more trades or businesses which are under common control, service with any employer which is under common control, shall be taken into account for these purposes.

Inclusion of the above described entities as "employers who maintain the plan" was criticized in the comments on the ground that it could result, especially in the case of large corporate conglomerates, in a far reaching limitation on post-retirement employment. This provision was also criticized as being too limited, and not accommodating situations where a non-multiemployer plan credits participants for service with related employers who maintain separate plans and who would not be considered members of a controlled group, or under common control, with an employer maintaining the plan.

Because the minimum standards rules under 29 CFR Part 2530 generally present a body of interdependent provisions, and because the Department believes that interpretation of the phrase "an employer who maintains the plan" in section 203(a)(3)(B)(i) should be

(FOOTNOTE 6 CONTINUED NEXT PAGE)

or § 203(a)(3)(B) of ERISA (29 U.S.C. § 1053(a)(3)(B)) when the parameters of such definitions were left by the same statutes to future action by the Secretary of Labor in regulations promulgated for the purpose.⁷

By the same token, § 414 of the Code cannot be regarded as the final

(FOOTNOTE 6 CONTINUED)

consistent with the meaning given to that phrase as used in other sections of Part of Title I of the Act, the Department believes that it is appropriate to include employers described in §2530.210(d) and (e) as employers maintaining the plan for purposes of suspension of benefits.

Dept. of Labor Notice of Final Regulation, Filed June 19, 1981, for 29 C.F.R. §2530.203-3, Pens. Rep. (BNA) No. 326, at R-50 to R-51 (Jan. 26, 1981)(emphasis added)(footnotes omitted).

⁷ Because of that specific grant of authority, Caldwell's reliance upon the general definition of nonforfeitability in 29 U.S.C. § 1002(19) is not helpful, nor, for the same reason, is Caldwell's reliance upon various notices by the Department of Labor to the effect that until the proposed regulations became final plans would be judged by the law without reference to the regulations. 43 Fed. Reg. 59098, 59099 (1978).
(FOOTNOTE 7 CONTINUED NEXT PAGE)

explanation of the reach of § 411, since that would vitiate the express and simultaneous statutory grant of authority for that purpose given to the Secretary of Labor in § 411(a)(3)(B) itself.

Pursuant to its identical grants of authority in both statutes, the Department of Labor entered into an extensive rulemaking process with respect to the definitions and application of both § 411(a)(3)(B) of the Code and § 203(a)(3)(B) of ERISA (29 U.S.C. § 1053(a)(3)(B)), as well as other portions of the statutes. That process was in a high state of flux in November, 1979, when Caldwell was retired. In fact, the Department of Labor at that time was

(FOOTNOTE 7 CONTINUED)

Furthermore, such provisions were not meant to penalize employers. To the contrary, they were intended to assure employers that they would not be penalized retroactively for not observing various restrictions which were being proposed in the regulations, but which would not be enforced until the regulations became final. Id.

actively soliciting and receiving
- comments from employers.

On December 19, 1978, the Department of Labor published at 43 Fed. Reg. 59098 (1978), its notice of proposed rule-making on "Suspension of Benefit Rules," 29 C.F.R. § 2530.203-3, relating to the statutes in question, and inviting comments and setting up a hearing schedule. As part of the normal hearing and comment process, AT&T wrote to the Department of Labor on March 5, 1979, expressing concern that a literal reading of the proposed regulations would exclude suspensions of benefits to retirees who are reemployed by companies maintaining reciprocal benefit arrangements with one another, under separate plans. It urged a clarification to include such arrangements, stating:

Under [proposed] Section 2530.203-3(b)(1), a plan may permanently suspend pension benefits because of reemployment of a retiree if such individual completes 40 or more hours of

service for an employer which maintains the plan, including employment by an employer which is a member of a control group of corporations, another member of which is paying the pension. In our opinion, such a rule is overly restrictive and does not take full cognizance of economic realities. The Bell System is comprised of a number of associated and subsidiary companies, most of which are members of a control group of corporations within the meaning of Section 1563 of the Internal Revenue Code. However, certain associated Bell System companies, such as Southern New England Telephone Company and Cincinnati Bell, are not members of such control group. Nonetheless, these latter companies and other Bell System companies commonly participate in an arrangement whereby service for one such company is recognized by any other such company for which an individual is employed for purposes of pension plan participation, vesting and benefit accrual under essentially identical plans maintained by each company. A literal application of the proposed Department rule would not allow for the suspension of pension payments upon the reemployment of a retiree who is receiving a pension payment from one Bell System "interchange" company and who is reemployed by another such company. This is because the proposed regulation appears to restrict the suspension to instances of reemployment by an employer who maintains the same plan as the employer making the pension payments and who is also a

member of the control group. We suggest an alternative rule which would give effect to the practice of the Bell System and other national multiple corporation groups and which would allow for the suspension of pension payments upon reemployment by any member of such group if either (1) the current employer is a member of a control group of which the employer making the pension payments is also a member, or (2) the current employer and the employer making the pension payments credit an employee for service with each other for all purposes of participation, vesting and accrual, as long as, in either (1) or (2) above, the current employer and the employer making the pension payments maintain the same or similar plans.

Addendum to Answer Brief of Appellee and
Brief in Chief of Cross-Appellant,
Southwestern Bell Telephone Co., Tab 7,
pp. 2-3 (emphasis in original).

A collateral, but relevant, event also occurred during this period. Companies within the AT&T system, including Bell, had amended their pension plans to conform to the 1978 amendments to the ADEA. The plan amendments prohibited compulsory retirement until age seventy,

with exceptions which included bona fide executives, who could be retired at age sixty-five as permitted by the ADEA. The amendments also included the provision at the heart of this dispute. That is, the amended Bell plan expressly provided for a suspension of benefits upon reemployment with a company which maintained an interchange of benefits with Bell. The amended plan was submitted to the Internal Revenue Service which notified Bell on July 11, 1979, that its plan, as amended, qualified under the provisions of the Code, which would include § 411(a)(3)(B).

The interpretative and rule-making process by the Department of Labor continued in flux through January 19, 1981, when the Department filed and published its proposed final regulations on suspension of benefit rules. In its published comments it directly addressed the question of reciprocal benefit

arrangements which had been raised by AT&T and others, and urged upon the Department. It stated:

"Reciprocity" and similar arrangements. Many commentators urged the Department to clarify [not extend] the applicability of provisions of the proposed regulation in the situation where a plan is a party to a reciprocal or similar type of arrangement, under which service by a plan participant for an employer which maintains a separate plan may, for example, be treated as service under the participant's plan for various purposes, or may be combined with service under the participant's plan in order to calculate the participant's entitlement to benefits. In the context of multiemployer plans, commentators suggested that terms "industry" and "geographic area covered by the plan" should be defined to include the industries and geographic area covered by plans with which the participant's plan has entered into a reciprocal agreement. With respect to plans other than multiemployer plans, it was suggested that the definition of the term "an employer which maintains the plan" should be defined to include an employer with which the participant's plan has an agreement for crediting service. Commentators argued that these changes should be adopted because under these types of arrangements, plan participants are afforded opportunities for benefit accrual, vesting and portability beyond

those required by the Act. While the Department generally supports the goals which reciprocal and similar arrangements seek to achieve, the Department is concerned that adoption of the suggestions described above might broaden the authority plans to impose suspensions beyond that contemplated by Congress. Accordingly, pending further study of the general nature, extent and effect of reciprocal and similar arrangements, the Department has decided not to adopt, at this time, the changes suggested in this regard.

Department of Labor Notice of Final Regulations filed January 19, 1981, for 29 C.F.R. § 2530.203-3, Pens. Rep. (BNA) No. 326, at R-51 (Jan. 26, 1981) (emphasis added).

On October 1, 1980, the Bell pension plan and plans of other companies in the AT&T system were merged. Affidavit of Therese F. Pick at Tab 2, pp. 2-3, Addendum to Answer Brief of Appellee and Brief in Chief of Cross-Appellant, Southwestern Bell Telephone Company. After the Department of Labor's final regulations (which did not include

companies having reciprocal benefit arrangements) became effective on January 1, 1982, the AT&T system-wide pension plan (which covered Bell) was immediately amended, effective as of that date, to limit the suspension of benefits to instances of reemployment with any company owned 80% or more by AT&T, i.e. the controlled group of corporations. That change, of course, was essentially technical and non-substantive, since it simply excluded the two remaining minority owned companies, Southern New England Bell and Cincinnati Bell (the other minority-owned company, Rochester, had been merged into AT&T in 1980).

This process, including relevant agency action, the conduct of Bell and other employers, and the broad authority given to the Department of Labor in the statutes to which the EEOC has referred for guidance under § 631(c), do not support the judgment of the district

court. While we by no means suggest that any interpretation of a statute is permissible until final regulations are published, we conclude that Bell's interpretation of the nonforfeiture provision of the bona fide executive exception in November 1979, and its inaction while seeking the type of clarification which Congress had expressly delegated to the Department of Labor, did not violate the statute. We arrive at that conclusion fully taking into consideration the general rule that this and similar statutes must be narrowly construed. See 29 C.F.R. § 1625.12(b).

First, it was apparent at the time of enactment that the interpretation of the nonforfeitability requirement in § 631(c)(1) was not to be confined to the words of that statute itself. The statute fell within the context of similar ERISA and tax provisions. In

acknowledgment of that fact, the EEOC expressly tied the interpretation of forfeitability under § 631(c)(1) to criteria set forth in the tax statute (§ 411(a)(3)(B)). That statute was, in turn, subject to interpretation by the Department of Labor, as was its counterpart in ERISA.

Second, it was equally apparent that exceptionally broad powers had been given to the Department of Labor by Congress in the ERISA and tax statutes to define the scope of employment or reemployment for permissible suspension of benefits purposes. Those powers reasonably included the power to include interchange companies and reciprocal plans within the term "employer." The comments by the Department of labor in its January 1, 1981 release to the effect that it would give "further study" to the interchange company proposal, but would not adopt it "at this time," suggest that the

Department itself believed it had the power to adopt such a definition. It is particularly significant that the Department of Labor, as late as January 19, 1981, treated the inclusion or exclusion of controlled groups of corporations within the relevant statutory definition as something which the agency had the power to decide, notwithstanding § 414(b) of the code and § 210(c) of ERISA (29 U.S.C. § 1060(c)).

Third, agency interpretation of the scope of the relevant statutes was in flux and constantly changing from 1978 through December 4, 1981. The "controlled group" inclusion under the definition of "employer who maintains the plan" was not necessarily the limit of that definition until January 1, 1982. Companies such as AT&T, inclusive of Bell, were not only entitled to view the definitional process as fluid, they, as part of the interested public, were

expressly solicited by the Department of Labor for input into shaping the governing regulations.

Fourth, when subsequent to the adoption of the 1978 amendments to the ADEA, Bell amended its plan to remove the age sixty-five mandatory retirement age, it applied for and received a favorable determination letter dated July 11, 1979 from the IRS to the effect that the plan, as amended, was in compliance with § 401, et. seq., of the code, including section 411. As the district court correctly noted, the IRS determination letter was not binding on the Department of Labor, or conclusive of the issue before us, but it certainly added support and legitimacy to the reasonableness of AT&T's proposal, its own view of that matter and its (and Bell's) reliance upon the rule-making process. It is wholly inconsistent to argue on the one hand that § 411(a)(3)(B) was so clear that employers were at peril

if they failed to act, and, on the other hand, to argue that it is understandable if the IRS, one of the three agencies charged with supervision, could not correctly interpret and apply the law to plans which relied, on their face, on interchange arrangements with other companies.

Fifth, Caldwell's position, and the judgment of the district court, amounts to a conclusion that the pension plans of the entire nationwide AT&T system of companies were in violation of the bona fide executive exception for four years, from the date of the enactment of that exception in 1978, through January 1, 1982, when the relevant pension plan provisions were changed. Doubtless there were other employers in the country in a similar situation, or so one would glean from the comments published by the Department of Labor in its January 19, 1981 Notice of Final Regulations. Yet,

there is not an iota of evidence in this record or any authority shown to us by the parties, suggesting any enforcement or other action by either the EEOC, the Department of Labor, or the Internal Revenue Service which lends the slightest support to Caldwell's position. To the contrary, it appears evident that no enforcement or other actions were taken by any of those agencies until after employers had adequate opportunity to amend their plans following the effective date of the final regulations on January 1, 1982. We take that as further confirmation of the position that the relevant law on forfeitability was unclear in 1979, and the governing agencies knew it.

Finally, although Bell's own position in 1979 does not control the interpretation of the statute, it tends to support the view that the law was indeed in flux as to the relevant

definitions relating to nonforfeitability. It would have been simple for Bell to have amended its plan if the necessity was clear. In its case an "interchange company" definition was only a minuscule step (3 out of 37 companies in the AT&T system) from a "controlled group" of companies definition, and we assume that a combined plan was not critically different from reciprocal plans. The reasonableness of the interchange company proposal was manifest by the facts that the reciprocity of benefits program was inherently pro-employee, that it had been a part of the AT&T system for decades and had not been erected to evade the bona fide executive exception of the ADEA. In fact, no AT&T employee had ever had retirement benefits suspended because of reemployment with one of the three minority owned companies in the AT&T system. See Affidavit of Therese F.

Pick, Addendum to Answer Brief of Appellee and Brief in Chief of Cross-Appellant, Southwestern Bell Telephone Company at Tab 2, p.6. The record does not establish that AT&T or Bell stood to gain any advantage under the ADEA from relying on an interchange of benefits rather than a controlled group approach. As soon as the rule-making process was completed, effective January 1, 1982, the relevant plan provisions were amended to exclude the two remaining minority companies, thus confining the suspension of benefits provision to the controlled (80% or more owned) group of companies.

In summary, it is clear to us that the law on forfeitability under § 631(c)(1) was not settled on November 30, 1979. Under the circumstances of this case, we decline to hold Bell on November 30, 1979, to the technical exactitude of regulations which became effective on

January 1, 1982, and retroactively to disqualify its plan provision where none of the regulatory agencies have seen any reason to reach such a conclusion. It would subvert the intent of the rule-making process, and ignore the realities of the extremely broad powers given to and being exercised by the Department of Labor with respect to defining the scope of these nonforfeitability provisions.

Accordingly, we reverse the judgment of the district court on this issue, and hold that Caldwell's retirement by Bell properly fell within the bona fide executive exception under the ADEA.

III

Because of our holding reversing the district court on the sole ground for liability in this case, we also reverse the award of attorney's fees to Caldwell, which is subject of a separate appeal by Bell, docket no. 88-1332.

Also because of our holding, it is unnecessary for us to address the remaining issues raised by the parties with the exception of Caldwell's contention that the district court erred when it denied him leave to amend his complaint. As to the issue we simply observe that the determination of whether to grant or deny leave to amend is within the discretion of the court and the court's decision relative to an amendment to subject to reversal only for abuse of that discretion. LeaseAmerica Corp. v. Eckel, 710 F.2d 1470, 1473 (10th Cir. 1983). We find no such abuse of discretion by the district court in this case.

Other issues raised by Caldwell, including his argument that the district court erred in dismissing Count II of his complaint, are without merit.

IV.

For the reasons stated in this opinion, we REVERSE the judgment of the district court that Bell violated the ADEA. We likewise reverse the award of damages and attorneys fees to Caldwell. We AFFIRM the rulings of the district court denying Caldwell leave to amend his complaint, holding that the January 1, 1979 amendment to Bell's pension plan was not a subterfuge to evade the purposes of the ADEA, and dismissing Count II of Caldwell's complaint.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARL P. CALDWELL,	)	[FILED
	)	U.S. Court of
Plaintiff-Appellant	)	Appeals
Cross/Appellee.	)	June 1, 1989
	)	Robert L.
v.	)	Hoecker, Clerk]
)	
SOUTHWESTERN BELL)	
TELEPHONE COMPANY,	)	No. 87-2647
	)	87-2711
Defendant-Appellee,	)	87-1332
Cross/Appellant.)	

ORDER

Before HOLLOWAY, Chief Circuit Judge,
MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON,
TACHA, BALDOCK, BRORBY, EBEL, Circuit
Judges, BROWN*, District Judge.

This matter comes on for consideration
of appellant's petition for rehearing
with suggestion for rehearing en banc in
the captioned appeal.

Upon consideration whereof, the
petition for rehearing is denied by the
panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all of the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

*Honorable Wesley E. Brown, District Judge for the U.S. District Court for the District of Kansas, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Sept. 30, 1987
	)	Robert D. Dennis
v.	)	Clerk]
)	
SOUTHWESTERN BELL	)	NO. CIV-81-114-T
TELEPHONE COMPANY,)	
)	
Defendant.)	

JUDGMENT

Pursuant to the Court's Memorandum Opinion and Order dated July 17, 1987, judgment is hereby entered in favor of the plaintiff, Carl P. Caldwell, and against the defendant, Southwestern Bell Telephone Company, in the amount of \$322,386.39, together with costs and post-judgment interest at the rate of 7.22% per annum until paid.

This judgment is based on the following specific awards:

(1) \$99,263.75 net, for back pay and

fringe benefits covering the period December 1, 1979, through February 28, 1982, after deduction of the total amount of pension and social security checks received by plaintiff and his family during that same period.

- (2) \$13,571.30 for lost social security benefits during the period March 1, 1982, to October 1, 1987.
- (3) \$29,148.79 for unpaid pension benefits to which he is entitled for the period March 1, 1982, to October 1, 1987.
- (4) \$46,046.87 as pre-judgment interest on items (1), (2) and (3).
- (5) \$49,330.11 for loss of social security benefits from date of judgment to life expectancies of plaintiff and his spouse, discounted to present value at 6% per annum.
- (6) \$85,025.57 for loss of pension benefits from date of judgment to

life expectancies of plaintiff and
his spouse, discounted to present
value at 6% per annum.

ENTERED this 30th day of September, 1987.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 9-30-87

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Jan. 28, 1988
	)	Robert D. Dennis,
v.	)	Clerk]
)	
SOUTHWESTERN BELL	)	CIV-81-114-T
TELEPHONE COMPANY,)	
)	
Defendant.)	

AMENDED JUDGMENT

The Judgment entered herein on September 30, 1987, is amended to include the following: Judgment is also entered in favor of the plaintiff, Carl P. Caldwell, and against the defendant, Southwestern Bell Telephone Company, in the amount of \$161,193.19 for plaintiff's reasonable attorneys fee.

ENTERED this 28th day of January, 1988.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT DOCKET ON 1-28-88

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIST OF OKLAHOMA

CARL P. CALDWELL,)	
	)	[FILED
Plaintiff,	)	U.S. D. Ct.
	)	W.D. of Okla.
v.	)	July 17, 1987
	)	Robert D. Dennis
SOUTHWESTERN BELL	)	Clerk]
TELEPHONE COMPANY,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

On January 27, 1987, a hearing was held in this case on the damages to be recovered by the plaintiff herein. At the hearing, the Court directed the parties to brief several issues, which follow, rather than to submit evidence on those issues at the hearing. The Court did hear testimony on the issue of the plaintiff's mitigation of damages. The Court's ruling on each issue which was briefed will be discussed in seriatim.

I.

**MOTION TO VACATE DUE TO NEWLY
DISCOVERED EVIDENCE**

The plaintiff claims that the amendment to defendant's pension plan which cured its invalidity was not adopted until February 1, 1982. Thus, he concludes that making the amendment retroactive to January 1, 1982, is a violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1054(g)(1), because it effectively deprives him of accrued benefits under the plan. The plaintiff goes on to submit that the entire plan is thus invalid, and that he has still not been legally retired. The defendant responds that information as to the date of the amendment was available to plaintiff as early as September of 1982, and cannot be used by him at this point as grounds for vacating the Court's Order of May 22, 1986.

The Court agrees with defendant that the validity of the entire plan should not at this point be questioned because

of the retroactive amendment. However, there is no reason why the plan should be applied in a way so as to deprive plaintiff of benefits accrued at the time the amendment was adopted. Therefore, the Court will consider February 28, 1982, as the first date on which plaintiff could have been legally retired for the purposes of computing the damage award herein. The Court has chosen February 28, 1982, rather than February 1, 1982, as the applicable date because by company policy plaintiff could not be retired until the last day of the month.

II.

DEDUCTION OF SOCIAL SECURITY BENEFITS RECEIVED

The plaintiff contends that social security benefits should not be deducted from the award of back pay because such payments are collateral source benefits citing EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980) (district court did not

abuse its discretion by refusing to deduct unemployment compensation from ADEA back pay award). The defendant contends that social security benefits received by plaintiff and his family for the period between November 30, 1979, and February 28, 1982, should be deducted from the back pay award. Defendant cites the case of EEOC v. Wyoming Retirement System, 771 F.2d 1425, 1431 (10th Cir. 1985), as authority for its position. Although the court in Wyoming Retirement referred to the burden on the public treasury if social security benefits were not deducted in that case, it also held that deduction of collateral source income from a back pay award is a matter within the trial court's discretion. Plaintiff herein would not have received the social security benefits had he continued working for the defendant and he will still be made whole even if his damage award is reduced to the extent of

the social security payments. Thus, consistent with this Court's prior ruling regarding offset of pension benefits, plaintiff's back pay award will be reduced by the amount of social security benefits received during the period from November 30, 1979, to February 28, 1982.

III.

LOSS OF SOCIAL SECURITY BENEFITS BY EARLY FORCED RETIREMENT

The plaintiff also contends that because he was forced to retire at age 65 as of November 30, 1979, he will receive social security benefits based upon a smaller figure than that applicable on February 28, 1982. The defendant refers to this as a deferred retirement premium. The Court agrees with the plaintiff in that his entitlement to social security benefits should be determined on the date on which he could have first been legally retired: February 28, 1982. Because the social

security benefits themselves cannot be adjusted, the plaintiff is entitled to receive the difference between the benefits he receives based upon the early forced retirement date of November 30, 1979, and the amount of benefits he would have received had the benefits been calculated as of the proper retirement date, February 28, 1982. The Court finds that the plaintiff is entitled to receive this difference in benefits for the period from February 28, 1982, through the date of his life expectancy as provided by actuarial tables and as stipulated by the parties. The total enhanced future payments (those which will accrue after judgment herein) should be discounted to present value if they are paid in a lump sum.

IV.

INCREASE IN PENSION BENEFITS DUE TO EARLY FORCED RETIREMENT

The plaintiff contends that because he

could not be legally retired until February 28, 1982, his pension rights should be based on his entitlement as of that date. He explains that because of his monthly pension is figured on his base salary and length of service as of the date when he was forcibly retired, November 30, 1979, he is entitled to an increase in pension benefits based on the later date of February 28, 1982. In opposition, the defendant contends that under the Bell System Management Pension Plan, the benefits are determined as of the normal retirement age, which is age 65. Plaintiff counters that freezing benefits at age 65, with regard to an employee who continues to work past that age, is in and of itself a discriminatory act violative of the ADEA. However, a bona fide employee benefit plan which "freezes" pension benefits at age 65 is expressly permitted under the ADEA. 29 U.S.C. §623(f)(2), 29 C.F.R. §860.120

(1986). Because the amendment sets benefits at the normal retirement age, the plaintiff is not entitled to receive any greater benefits than had he remained in employment with the defendant until the proper retirement date, February 28, 1982. Plaintiff's request for an increase in his pension benefits due to his early forced retirement is, therefore, denied.

V.

**TAXATION OF SOCIAL SECURITY
BENEFITS AWARDED**

The plaintiff contends that the judgment herein should include an amount to compensate him for taxes he will incur as a consequence of receiving enhanced social security benefits as part of a damage award rather than as nontaxable payments from the Social Security Administration. Plaintiff distinguishes Blim v. Western Electric Company, Inc., 731 F.2d 1473 (10th Cir.

1984). In Blim, the Court did not allow an award based on increased tax liability created by the receipt of damages in a lump sum because the tax loss to be suffered by the plaintiffs therein could be eliminated through provisions allowing for five-year averaging under the Internal Revenue Code. Because the plaintiffs would suffer no significant tax penalty, the Blim court held that it was error for the district court to award damages to the plaintiffs to cover such increased tax liability.

In the instant case, the plaintiff has failed to provide the Court with evidence as to the extent of his tax liability in the event enhanced social security benefits are awarded in a lump sum. As the defendant points out, there is no evidence before the Court of the plaintiff's financial condition, including the tax bracket applicable to the plaintiff. The only "evidence"

before the Court is an exhibit attached to the plaintiff's brief on the damages issue which purports to delineate unsubstantiated figures for the damage period. Furthermore, Congress has recently changed its policy regarding the taxability of social security payments rendering any award intended to compensate for taxation even more speculative. Therefore, the Court is not inclined to include in the damages award an amount for additional income tax liability and the plaintiff's request for damages to defray his alleged future income tax liability is denied.

VI.

PRE-JUDGMENT INTEREST ON THE JUDGMENT

It was held in Blim v. Western Electric Company, Inc., supra, that age discrimination victims who receive liquidated damages are not also entitled to an award of pre-judgment interest, citing the United States Supreme Court

case of Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945). In this Court's Order of May 22, 1986, it was determined that this defendant's violations of the ADEA were not willful and that liquidated damages were thus inappropriate. Therefore, the Court finds Blim, supra, inapposite and finds plaintiff is entitled to pre-judgment interest for the defendant's use and retention of pay and other benefits to which it has been determined he is entitled. It appears that the defendant has stipulated that the applicable pre-judgemnt interest rate is 6%, and appears not to dispute the fact that case law supports the award of pre-judgment interest if liquidated damages are not awarded.

Therefore, the Court finds that pre-judgment interest shall be allowed and that this interest shall be calculated on the net judgment amount from November 30, 1979, through February

28, 1982. The net judgment amount includes the amount of money which the plaintiff has actually been without. In otherwords, amounts which the plaintiff actually received, such as pension funds and social security payments, shall not be included in calculating pre-judgment interest. As the figure of 6% is agreed to be appropriate, the calculation for pre-judgment interest shall be determined by multiplying .000164, the daily rate using 6% per annum, times the total amount of judgment determined to be appropriate, to determine the amount of interest per day; this per day dollar figure shall then be taken times the number of days that plaintiff lost the use of his money and benefits. The applicable period shall run from December 1, 1979, to the date of judgment.

VII.

OFFSET FOR FAILURE TO MITIGATE

Defendant urges that a further reduction of plaintiff's back pay award is appropriate for sums plaintiff could have earned between November 30, 1979, and February 28, 1982. The defendant has offered expert testimony as to plaintiff's employment opportunities during this time period. The Court did not find this testimony, however, to be persuasive. The expert's conclusions were speculative and not well supported by the facts, even as reconstructed by defendant. Plaintiff was 65 years of age at the time of his separation from Southwestern Bell. He had worked for Bell approximately 44 years. Plaintiff's testimony was that his social security benefits would have been jeopardized had he taken another job. Furthermore, plaintiff's back pay award is being offset by these social security benefits. Thus, defendant should not be heard at

this time to complain about plaintiff's decision to rely on his social security benefits rather than to actively seek new employment. It is the defendant's burden to show that plaintiff did not use reasonable effort to mitigate his damages. E.E.O.C. v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980).

Defendant has not met this burden.

Therefore, there will be no offset for plaintiff's alleged failure to mitigate his damages by seeking other employment.

VIII.

CONCLUSION

It appears to the Court that with the guidance provided by this and previous orders, the parties should be able at this point to reach a stipulation as to the amount of damages to which plaintiff is entitled. The elements of the damage award should include plaintiff's salary plus fringe benefits offset by pension and social security benefits received,

payment for loss of social security benefits due to plaintiff's early forced retirement, and pre-judgment interest at the rate of 6% per annum on the net judgment amount from December 1, 1979, through the date of judgment. The parties are hereby ordered to confer in good faith in an attempt to present to the Court a stipulated form of judgment. In the event the parties are unable to agree within thirty (30) days from the date hereof, each party is to submit to the Court its version of the proposed form of judgment, together with a motion explaining in detail the points on which the parties disagree. Before filing any such motion, the parties are cautioned to be mindful of the responsibilities imposed by Rule 11 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED this 16th day of July, 1987.

/s/ Ralph G. Thompson
UNITED STATES DIST JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	May 22, 1986
	)	Robert D. Dennis
vs.	)	Clerk]
)	
SOUTHWESTERN BELL	)	NO. CIV-81-114-T
TELEPHONE COMPANY,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

On January 30, 1986, the Court heard oral argument on various pending motions in this case. The parties outlined the issues within these various motions which were most relevant, and the Court now addresses each of these issues in that form, with less emphasis being placed on each motion filed.

I. TIMELINESS - LIMITATIONS ISSUE

Defendant has alleged that plaintiff failed to timely file his charge of

discrimination pursuant to 29 U.S.C. §621 et seq. and asks the Court to dismiss the action. Defendant claims that the case of Delaware State College et al. v. Ricks, 449 U.S. 250 (1980) is controlling and should be applied retroactively to this case. Ricks held that the significant point in time triggering the 180 day period for filing an EEOC claim is the date at which a plaintiff was informed of the decision to terminate his employment. Plaintiff argues that Ricks should not be applied retroactively to this case. However, if Ricks should be applied to this case, plaintiff has contended that his claim was timely filed because it was brought within 180 days of the date the defendant's Benefits Committee informed him of their vote to retire him. The Court finds that date to be the date the defendant made its "official position" known to plaintiff. In Ricks, the Supreme Court places

importance on the date of the Board's "official position". The Court makes no determination as to whether Ricks should be retroactively applied. Ricks supra, at 261. It is the Court's opinion however that whether Ricks is applicable, or whether pre-Ricks law applies, plaintiff's claim was timely filed. See Payne v. Crane Co., 560 F.2d 198 (5th Cir. 1977). Defendant's Motion for Judgment on the Pleadings, to Vacate and Dismiss are therefore without merit and are denied. Additionally, the first requested amendment to plaintiff's motion to amend is overruled.

II. DAMAGES - EXTENT OF LIABILITY

At the time of plaintiff's discharge, defendant's retirement plan in effect for plaintiff was not a nonforfeitable plan as required under 29 U.S.C. §631(C)(1). See this Court's Order of August 20, 1982. However, the defendant amended the retirement plan to become non-forfeitable

effective January 1, 1982. Under those circumstances, if plaintiff had remained in employment until January 1, 1982, he would have lost the protection of the Act at that time and would have been subject to retirement then, when plan was cured. Therefore, had he remained, the greatest expectation of benefits would have been full salary until the date of the revision of the plan, unless it could be assumed defendant would have extended his employment.

The plaintiff contends that even if the pension plan was amended to eliminate its forfeitability provision, defendant still failed to comply with the other conditions precedent found in §631(c)(1): (1) that he must be a bona fide executive, and (2) that he must have held that position for the two years immediately preceding his termination. Therefore, plaintiff contends his termination was unlawful and that

damages for the period from November 30, 1979 to January 1, 1982, are inadequate.

On August 20, 1982, this Court, without a factual discussion, denied defendant's motion for summary judgment on the issue of the bona fide executive issue. It appears to the Court now that that ruling was improper, and that the executive issue is proper for a summary judgment ruling.

The definition of "employee employed in a bona fide executive" capacity is found at 29 CFR §541.1, cross-referenced from 29 CFR §1625.12. The definition contained therein unmistakably applies to the plaintiff based upon the facts which are contained in the record. As General Accounting Manager, plaintiff was department head of the accounting department for Oklahoma. He was considered by defendant to be at the fifth management level which was the highest level of management of the

department heads in Oklahoma. Management levels three and four, as well as all 441 employees in the department, reported directly to him. Based upon the job description, written by plaintiff himself, he exerted wide discretion in administering and deciding where to utilize personnel most effectively and productively. He was also responsible for selection, training and monitoring the progress of all management employees. Based upon these undisputed facts, as a matter of law, plaintiff's job fell within the "bona fide executive" exception of the ADEA.

The remaining condition precedent in §631(C)(1), the two year requirement, is not, in the opinion of this Court, a requirement which should be read so literally and mechanically that the legislative purpose of §631(C)(1) is overlooked. The two-year requirement was added "to prevent an employer from

circumventing the law by appointing an employee to a bona fide executive or high policymaking position shortly before retirement in order to permit compulsory retirement of that employee...." United States Code Cong. & Admin. News, 95th Cong. 2nd Session, p. 530 (1978). It is undisputed in this case that plaintiff had held the same position since 1964, a great deal longer than two years. Although the retirement of plaintiff was unlawful, due to the retirement plan then in existence, the defendant corrected the situation by revising the plan effective January 1, 1982. At that point, the only remaining "flaw" in the plaintiff's retirement was the fact that he had not been employed two years immediately prior to that date. Assuming plaintiff is paid his regular salary for the period of time from his termination to January 1, 1982, he can be said to have received what he would have received

if his employment had continued until January 1, 1982. The revision of the retirement plan, therefore, had the effect of extending plaintiff's employment to the two-year period immediately preceding the effective date of the plan's revision, i.e., the effective date of his retirement. This result entitles the plaintiff to receive the protections which this Court finds were intended under the ADEA. He can be protected only until the effective date of the plan's revision, as he had no expectation of employment beyond that date. If a plaintiff is made whole, he is fully compensated. The extend of his measure of damages, therefore, is the period of time from November 30, 1979 to January 1, 1982.

The Court's resolution of the above issues renders moot the third requested amendment to plaintiff's motion to amend.

III. SUMMARY JUDGMENT: WILLINGFULNESS

AND LIQUIDATED DAMAGES

The parties have filed cross motions for partial summary judgement on the issue of defendant's alleged willful violation on the ADEA. Willful violations of the ADEA can subject employers to liquidate damages under 29 U.S.C. §626(b). Both parties have agreed that the "reckless disregard" standard in the case of TWA v. Thurston, 469 U.S. _____ (1985) is the applicable standard. Having carefully considered the steps taken by defendant to determine the validity of its retirement plan after the 1978 amendments of the ADEA, the Court finds that defendant's actions fall short of reckless disregard. Although the Court cannot say that its reliance upon communications from the IRS and Department of Labor, or the ERISA definition of forfeitable was well placed, it does not appear to have been done in bad faith. For that reason,

plaintiff is not entitled to liquidated damages.

IV. SETOFF OF PENSION PLAN BENEFITS
FROM BACK PAY AWARD

An issue which bears directly on the measure of damages is the issue of whether plaintiff is required to deduct the pension payments he has been receiving from the salary he will receive. This issue is presented in plaintiff's motion to amend.

The defendant contends that plaintiff is not entitled to receive full salary plus pension payments received in the interim and cites E.E.O.C. v. Wyoming Retirement System, 771 F.2d 1425 (10th Cir. 1985) as authority. In that case the Court upheld the trial court's deduction of social security payments from a back pay award. The Court noted that the claimants would still be made whole even if the benefits were deducted. The plaintiff argues that the case is

distinguishable because the payments deducted were social security payments, or tax funds, which is not the case here.

The deduction of collateral sources of income from a back pay award is within the trial court's discretion. E.E.O.C. v. Wyoming Retirement System, 771 F.2d at 1431. Although the nature of the payments received by Mr. Caldwell are different from those in the above cited case, the issue which is important here was also found to be important in that case: the benefits would not have been received if his employment had continued and he can still be made whole even with the deduction. Id. at 1431. The purposes of the ADEA are thus fulfilled. It is therefore ordered that the back pay award to be received by plaintiff herein will be reduced by the amount of pension payments he has received.

Accordingly, it is ordered that plaintiff's motion to amend complaint is

denied as to the first and second requested amendments, and the third requested amendment is rendered moot. Defendant's motion for judgment on the pleadings, to vacate and to dismiss is overruled. Plaintiff's first motion for partial summary judgment is overruled and defendant's cross motion for partial summary judgment is granted. Plaintiff's second motion for partial summary judgment is granted. Plaintiff's second motion for partial summary judgment on the issue of willfulness and liquidated damages is overruled and defendant's cross motion for partial summary judgment on that issue is granted.

IT IS SO ORDERED this 22nd day of May, 1986.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON MAY 22,
1986

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	August 20, 1982
	)	Herbert T. Hope
vs.	)	Clerk]
)	
SOUTHWESTERN BELL	)	NO. CIV-81-114-T
TELEPHONE COMPANY,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

This action is before the Court for consideration of plaintiff's Motion for Partial Summary Judgment and defendant's Motion for Summary Judgment. The parties have fully briefed the issues presented by the motions.

On November 30, 1979, plaintiff was retired by defendant, at age 65, pursuant to Section 12(c)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §631(c)(1). Plaintiff commenced this action for damages

alleging that his termination was unlawful. Defendant has moved for summary judgment asserting that plaintiff was a bona fide executive pursuant to §12(c)(1) and that his forced retirement was therefore permissible under the ADEA. Plaintiff has moved for summary judgment, as to liability only, asserting that the pension he received upon his retirement was forfeitable in contradiction to the requirements of §12(c)(1) with the result that his forced retirement at age 65 was unlawful. Defendant has responded that the pension was nonforfeitable and that it is therefore entitled to the summary judgment it seeks.

Section 12(c)(1) of the ADEA provides as follows:

"Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, but not seventy years of age, and who, for the 2-year period immediately before retirement, is employed in a bona

fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$27,000.

At the time of plaintiff's retirement, Section 4.6 of the defendant's Plan for Employees' Pensions, Disability Benefits and Death Benefits provided, in part, that:

"Regular employment with this company or with any company with which arrangements for interchange of benefit obligations, as described in Section 9 of these Regulations, have been made directly or indirectly, shall suspend the right of a retired employee or person receiving a deferred vested pension to pension payments during the period he continues in such employment..."

Plaintiff argues that the pension plan under which he was retired was maintained solely by the defendant. Thus, plaintiff contends, his pension was not "nonforfeitable" as required by the ADEA

for the reason that his pension would have been suspended (and thereby "forfeited" pursuant to 29 C.F.R. §1625.12(k)(1)) under the terms of the plan if he had commenced employment with any company with which defendant had made arrangements for an interchange of benefit obligations.

In response, defendant argues that 29 C.F.R. §1625.12(k)(1) provides that a pension plan is not forfeitable under the ADEA if its benefits may be suspended for any reason permitted under 26 U.S.C. §411(a)(3). Defendant contends that 26 U.S.C. §411(a)(3)(B) permits a suspension of benefits if the plaintiff is employed, after retirement, by the employer who maintains the plan under which retirement benefits are being paid. Defendant further argues that it is necessary to examine the necessary definitions applicable to §411, contained in 26 U.S.C. §414(b), which provides that

"all employees of all corporations which are members of a controlled group of corporations ... shall be treated as employed by a single employer."

Defendant generally argues that the companies with which it had arranged for an interchange of retirement benefits are members of a controlled group of corporations and therefore the interchange agreements did not make the plaintiff's pension benefits forfeitable under the provisions of the ADEA.

The defendant's argument recognizes that a "controlled group of corporations" is generally defined by 26 U.S.C. §1563(a) as being an 80 percent control test. See, 26 C.F.R. §1.1563-1. Further, defendant recognizes that three companies with whom it had arranged for an interchange of retirement benefits, Cincinnati Bell, Inc., (Cincinnati), Southern New England Telephone Company (SNET), and Rochester Telephone

(Rochester), did not qualify as members of the controlled group of corporations at the time of plaintiff's retirement. Defendant argues that this deficiency in its pension plan has been cured by eliminating the suspension of pension benefits upon employment by Cincinnati or SNET. This amendment was effective on January 1, 1982.¹

Further, defendant argues that plaintiff received his pension benefits and was not employed by Cincinnati, SNET or Rochester prior to the effective date of the amendments so that any issue of forfeitability prior to January 1, 1982 is moot. Defendant's argument regarding

¹ Rochester ceased its participation in the interchange agreement on December 31, 1979, one month after plaintiff was forceably retired. Retired employees of the defendant have not been subject to a suspension of retirement benefit upon employment by Rochester since January 1, 1980.

mootness relies primarily upon DeFunis v. Odegaard, 416 U.S. 312 (1974).

The Court cannot accept the defendant's position that "no issue of forfeitability exists prior to January 1, 1982 since plaintiff admittedly was not reemployed by Rochester, Cincinnati or SNET and admittedly received his pension." On November 30, 1979, the defendant forceably retired Carl P. Caldwell for the single reason that he was sixty-five years of age. The determination to terminate plaintiff's employment was made without any regard to his performance as an employee. Congress has stated that such a determination may be the basis for an involuntary retirement if certain statutory prerequisites are met. One of these statutory conditions is that the retirement benefits available to the terminated executive, between the ages of 65 and 70, must be nonforfeitable at the

time of his retirement. Defendant now concedes that its interchange agreements with Rochester, SNET and Cincinnati created a possibility of forfeiture of the plaintiff's pension benefits, but claims that plaintiff was not harmed because he chose not to forfeit those benefits. The defendant's argument simply misses its mark. The mere existence of the possibility for a non-permissible forfeiture renders the plaintiff's pension benefits as forfeitable. By choosing the word "forfeitable," Congress imposed a requirement of certainty in the pension benefits of executives subject to early retirement. It did not require those executives who were forced from their jobs before attaining the age of 70 to actually endure a forfeiture of their pension in an attempt to establish that their early retirement was a violation of the ADEA. In this case, the plaintiff

was entitled to continued employment until such time as the defendant was able to satisfy the conditions precedent to an involuntary termination upon the basis of his age alone. The defendant's failure to satisfy those conditions renders the involuntary retirement of plaintiff a violation of the requirements of the ADEA and the plaintiff is entitled to recover for such a violation of this statute.

Defendant also states that the Internal Revenue Service determined that the pension plan provided to plaintiff was a qualified plan under the provisions of the Internal Revenue Code of 1954. Thus, defendant argues, plaintiff's attack upon the forfeitability of his pension is an impermissible collateral attack upon the IRS's determination that the pension is nonforfeitable. Defendant contends that plaintiff should be collaterally estopped to mount such an attack upon a valid administrative

determination. In support of this position defendant cites McCulloch Interstate Gas Corp. v. F.P.C., 536 F.2d 910 (10th Cir. 1976), and United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966).

In Utah Construction, supra, the Supreme Court set forth the general principles of collateral estoppel by stating:

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." 384 U.S. at 422.

Additionally, the Tenth Circuit discussed collateral estoppel in McCulloch Interstate Gas Corp., supra., and stated, "A party may not attack the validity of a prior agency order in a subsequent proceeding." 536 F.2d at 913.

The IRS determination that defendant's pension plan was a qualified plan was not

reached as a result of the IRS acting in a judicial capacity. Rather, the determination was issued upon the defendant's request for such a determination and was based upon information supplied to the IRS. The IRS limited its determination to a consideration of the plan under the provisions of the Internal Revenue Code. The IRS advised that its ruling was "not a determination regarding the effect of other federal or local statutes." Finally, the plaintiff was not a party to the IRS determination. While the defendant notified all plan participants that the plan had been amended and a determination of the qualified status of the amended plan would be sought from the IRS, defendant makes no suggestion that plaintiff chose to intervene, as a party or otherwise, in the determination. Moreover, while the defendant is entitled to rely upon the determination that its

pension plan was qualified for certain tax treatments, such a determination is subject to revision by the IRS upon the discovery of additional information.

See, 26 C.F.R. §§601.201(m) and (1)(4).

Inasmuch as plaintiff's retirement benefits were subject to a possible and impermissible forfeiture under the ADEA at the time of his forced retirement, his involuntary retirement at age 65 pursuant to §12(c)(1) of the ADEA was unlawful. Plaintiff is entitled to judgment as a matter of law upon the issue of the defendant's liability and plaintiff's motion for partial summary judgment is hereby granted. Accordingly, this action will be tried upon the issue of damages only. Defendant's motion for summary judgment is hereby denied. Plaintiff's motion to amend is hereby denied as moot.

IT IS SO ORDERED this 20th day of August, 1982.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

Entered in judgment docket
August 20, 1982

UNITED STATES CONSTITUTION,

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

5 U.S.C., APP. 1.

REORGANIZATION PLAN NO. 1 OF 1978

43 F.R. 19807, 92 Stat. 3781

* * *

EQUAL EMPLOYMENT OPPORTUNITY

* * *

**Section 2. Transfer of Age
Discrimination Enforcement Functions**

All functions vested in the Secretary of Labor or * * * (29 U.S.C. 621, 623,

626, 627, 628, 629, 630, 631, 632, 633,, and 633a) * * * are hereby transferred to the Equal Employment Opportunity Commission. All functions related to age discrimination administration and enforcement pursuant to * * * (29 U.S.C. 625 and 634) * * * are hereby transferred to the Equal Employment Opportunity Commission.

5 U.S.C., APP. 1.

REORGANIZATION PLAN NO. 4 OF 1978

43 F.R. 47713, 92 Stat. 3790

* * *

Section 101. Transfer to the Secretary of the Treasury.

* * * all authority of the Secretary of Labor to issue the following described documents pursuant to the statutes hereinafter specified is hereby

transferred to the Secretary of the Treasury;

(a) regulations, rulings, opinions, variances and waivers under * * * [section 1051 et seq. of Title 29] * * *

EXCEPT for sections * * * [* * * 1053(a)(3)(B), * * * of Title 29];

(b) such regulations, rulings, and opinions which are granted to the Secretary of Labor under * * * [sections * * * 411, * * * of Title 26], * * *

EXCEPT for * * * [section 411(a)(3)(B) of Title 26] * * *

**SELECTIVE PORTIONS OF THE
INTERNAL REVENUE CODE**

26 U.S.C. §411(a)(3)(B)

(3) Certain permitted forfeitures, suspensions, etc.--For purposes of this subsection--

* * *

(B) **Suspension of benefits upon reemployment of retiree.**--A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits--

(i) in the case of a plan other than a multiemployer plan, by the employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, the same trade or craft, and the same geographic area covered by the plan as when such benefits commenced.

The Secretary of Labor shall prescribe such regulations as may be

necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

26 U.S.C. §414(b)

(b) Employees of controlled group of corporations.--For purposes of sections 401, 408(k), 410, 411, 415, and 416, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the applicable limitations provided by section 404(a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations

prescribed by the Secretary.

26 U.S.C. §1563(a)(1)

(a) Controlled group of corporations.--For purposes of this part, the term "controlled group of corporations" means any group of--

(1) Parent-subsidiary controlled group.--One or more chains of corporations connected through stock ownership with a common parent corporation if--

(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d)(1)) by one or more

of the other corporations; and

(B) the common parent corporation owns (within the meaning of subsection (d)(1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

**SELECTIVE PORTIONS OF THE
AGE DISCRIMINATION IN EMPLOYMENT ACT**

29 U.S.C. §621

Congressional statement of findings and

purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. §623(a)(1)

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. §623(f)(2)

It shall not be unlawful for an employer, employment agency, or labor organization--

* * *

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

29 U.S.C. §626(c)(2)

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

29 U.S.C. §628

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

29 U.S.C. §631(a)

(a) Individuals at least 40 but less than 70 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

29 U.S.C. §631(c)(1)

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings,

or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$27,000.

**SELECTIVE PORTION OF THE EMPLOYMENT
RETIREMENT INCOME SECURITY ACT**

29 U.S.C. §1002(19)

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan

contains a provision described in section 1053(a)(3) of this title.

29 U.S.C. § 1053(a)(3)(B)

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age

* * *.

* * *

(3)(A)

* * *

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such periods as the employee is employed, subsequent to the commencement of payment of such

benefits--

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

29 U.S.C. §1060(a)(2)

(a) Plan maintained by more than one

employer

Notwithstanding any other provision of this part or part 3, the following provisions of this subsection shall apply to a plan maintained by more than one employer:

* * *

(2) Sections 1053 and 1054 of this title shall be applied as if all such employers constituted a single employer, except that the application of any rules with respect to breaks in service shall be made under regulations prescribed by the Secretary.

29 U.S.C. §1060(c)

(c) Plan maintained by controlled group of corporations

For purposes of sections * * * 1053 * * * of this title, all employees of all corporations which are members of a

controlled group of corporations (within the meaning of section 1563(a) of Title 26 * * * shall be treated as employed by a single employer. * * *.

29 U.S.C. §1102(b)(3)

(b) Requisite features of plan

Every employee benefit plan shall--

* * *

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan * * *

29 U.S.C. §1104(a)(1)(D)

(a) Prudent man standard of care

* * *

(1) * * * a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and

beneficiaries and--

* * *

(D) in accordance with the documents and instruments governing the plan * * * .

SELECTIVE PORTIONS OF THE
FEDERAL RULES OF CIVIL PROCEDURE

Rule 15(a), F.R.Civ.P.

Amended and Supplemental Pleadings

(a) **Amendments.** * * * a party may amend the party's pleading only by leave of court * * *

Rule 38(a) & (b), F.R.Civ.P.

Jury Trial of Right

(a) **Right Preserved.** The right of

trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action * * * Such demand may be indorsed upon a pleading of the party.

Rule 56(c), F.R.Civ.P.

Summary Judgment

* * *

(c) Motion and Proceeding Thereon.

* * * The judgment sought shall be rendered forthwith if * * * there is no genuine issue as to any material fact * * *.

26 C.F.R. §1.411(a)-4

[IRS REGULATIONS §1.411(a)-4]

§1.411(a)-4 Forfeitures, suspensions, etc

(a) **Nonforfeitability.** Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the

regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time.

* * *

(b) **Special rules.** For purposes of paragraph (a) of this section a right is not treated as forfeitable--

* * *

(2) **Suspension of benefits upon reemployment of retiree.** In the case of certain suspensions of benefits under section 411(a)(3)(B), see regulations prescribed by the Secretary of Labor under 20 CFR part 2530 (Department of

Labor regulations relating to minimum standards for employee pension benefit plans).

[DEPARTMENT OF LABOR REGULATION]

29 C.F.R. §541.1

§541.1 Executive.

The term "employee employed in a bona fide executive * * * capacity" in section 13(a)(1) of the act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees ow [sic] whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed;

* * *

[DEPARTMENT OF LABOR REGULATION]

29 C.F.R. §860.120(c)

* * *

(c) *"To observe the terms" of a plan.*

* * *

Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

[**EEOC REGULATION**]

29 C.F.R. §1625.12

§1625.12 Exemption for bona fide executive or high policymaking employees.

(a) Section 12(c)(1) of the Act, added by the 1978 amendments, provides: "Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such

employee which equals, in the aggregate, at least \$27,000.

(b) Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption must be narrowly construed.

(c) An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status. For example, an employee who falls within the exemption may be offered a position of lesser status or a part-time position. An employee who accepts such a new status or position, however, may not be treated any

less favorably, on account of age, than any similarly situated younger employee.

(d)(1) In order for an employee to qualify as a "bona fide executive," the employer must initially show that the employee satisfies the definition of a bona fide executive set forth in §541.1 of this chapter. Each of the requirements in paragraphs (a) through (e) of §541.1 must be satisfied, regardless of the level of the employee's salary of compensation.

(2) Even if an employee qualifies as an executive under the definition in §541.1 of this chapter, the exemption from the ADEA may not be claimed unless the employee also meets the further criteria specified in the conference Committee Report in the form of examples (see H.R. Rept. No. 95-950, p. 9). The examples are intended to make clear that the exemption does not apply to middle-management employees, no matter

how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business. As stated in the Conference Report (H.R. Rept. No. 95-950, p. 9):

Typically the head of a significant and substantial local or regional operation of a corporation [or other business organization], such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the terms "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.

The heads of major departments or divisions of corporations [or other

business organizations] are usually located at corporate or regional headquarters. With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a product line basis, the management of product lines), the definition would cover employees who head those divisions.

In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conference intend the definition to cover such employees if they possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

(e) The phrase "high policymaking

position," according to the Conference Report (H.R. Rept. No. 95-950, p. 10), is limited to " * * * certain top level employees who are not 'bona fide executives' * * *." Specifically, these are:

* * * individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.

For example, the chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or scientific trends and issues, to develop and recommend policy direction to the top executive officers of the corporation, and he would have a significant impact on

the ultimate decision on such policies by virtue of his expertise and direct access to the decisionmakers. Such an employee would meet the definition of a "high policymaking" employee.

On the other hand, as this description makes clear, the support personnel of a "high policymaking" employee would not be subject to the exemption even if they supervise the development, and draft the recommendation, of various policies submitted by their supervisors.

(f) In order for the exemption to apply to a particular employee, the employee must have been in a "bona fide executive or high policymaking position," as those terms are defined in this section, for the two-year period immediately before retirement. Thus, an employee who holds two or more different positions during the two-year period is subject to the exemption only if each such job is an executive or high

policymaking position.

* * *

(h) The "annual retirement benefit," to which covered employees must be entitled, is the sum of amounts payable during each one-year period from the date on which such benefits first become receivable by the retiree. Once established, the annual period upon which calculations are based may not be changed from year to year.

(i) The annual retirement benefit must be immediately available to the employee to be retired pursuant to the exemption. For purposes of determining compliance, "immediate" means that the payment of plan benefits (in a lump sum or the first of a series of periodic payments) must occur not later than 60 days after the effective date of the retirement in question

* * *

(j)(1) The annual retirement benefit

must equal, in the aggregate, at least \$27,000. . . .

* * *

(k)(1) The annual retirement benefit must be "nonforfeitable." Accordingly, the exemption may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree or result in the reduction of benefits to less than \$27,000 in any one year. For example, where a plan contains a provision under which benefits would be suspended if a retiree engages in litigation against the former employer, or obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits are discontinued or suspended for reasons permitted under section 411(a)(3) of the Internal Revenue Code.

* * *

[DEPARTMENT OF LABOR REGULATION]

29 C.F.R. §2530.203-3(a) & (c)

[Effective date January 1, 1982]

§2530.203-3 Suspension of pension
benefits upon reemployment of retirees.

(a) *General.* Section 203 (a)(3)(B) of the Act provides that the right to the employer-derived portion of an accrued pension benefit shall not be treated as forfeitable solely because as employee pension benefit plan provides that the payment of benefits is suspended during certain periods of reemployment which occur subsequent to the commencement of payment of such benefits.

* * *

(c) *Section 203(a)(3)(B) Service.--(1)*
Plans other than multiemployerplans.

In the case of a plan other than a multiemployer plan, as defined in section 3(37) of the Act, the employment of an employee, subsequent to the time the payment of benefits commenced on, would have commenced if the employee had not remained in or returned to employment, results in section 203(a)(3)(B) service during a calendar month if the employee, in such month, completes 40 or more hours of service, as defined in 29 CFR 2530.200b-2(a)(1), for an employer which maintains the plan, including employers described in §2530.210(d) and (e), as of the time that the payment of benefits commenced or would have commenced if the employee had not returned to employment.

* * *

[Department of Labor Regulation]

[Effective Date December 28, 1976]

29 C.F.R. §2530.210(b)

**§2530.210 Employer or employers
maintaining the plan.**

*** * ***

*(b) General rules concerning service
to be credited under this section.*

Section 210 of the Act and sections 413(c), 414(b), and 414(c) of the Code provide rules applicable to sections 202, 203, and 204 of the Act and sections 410, 411(a), and 411(b) of the Code for purposes of determining who is an "employer or employers maintaining the plan" and, accordingly, what service is required to be taken into account in the case of a plan maintained by more than one employer. Paragraphs (c) through (e) of this section set forth the rules for determining service required to be taken

into account in the case of a plan or plans maintained by multiple employers, controlled groups of corporations and trades or businesses under common control.

* * *

[PERTINENT PORTIONS OF NOTICES,
INTERPRETATIONS, PROPOSED RULES,
AND REGULATIONS AS PUBLISHED IN THE
FEDERAL REGISTER]

43 F.R. p. 59098 (December 19, 1978)

DEPARTMENT OF LABOR

Pension and Welfare Benefit Programs

* * *

RULES AND REGULATIONS FOR MINIMUM
STANDARDS FOR EMPLOYEE BENEFIT PLANS

Suspension of Benefit Rules

AGENCY: Department of Labor.

ACTION: Proposed rulemaking.

SUMMARY: This document contains a proposed regulation governing the circumstances in which it is permissible for a plan to suspend the payment of

benefits to a retiree. The Employee Retirement Income Security Act of 1974 (the Act) authorizes the Secretary of Labor to prescribe regulations setting forth the circumstances and conditions under which the right of a retiree to a benefit payment is not treated as forfeitable solely because the plan provides that benefit payments are suspended during periods of reemployment. The proposed regulation, if adopted, would affect employees covered under employee pension benefit plans.

DATES: Written comments must be received by the Department of Labor (the Department) on or before March 6, 1979. Except for paragraphs (b)(4) and (b)(6), the proposed regulation, if adopted, would become effective, for Title I purposes, 30 days after adoption. The proposed regulation for purposes of section 411(a)(3)(B) of the Internal

Revenue Code of 1954, as amended, and paragraphs (b)(4) and (b)(6) of the regulation for Title I purposes, would become effective for plan years beginning after the effective date of the regulation for Title I purposes. . . .

p. 59099-59100.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Department has under consideration a proposed regulation setting forth the circumstances and conditions under which a plan may provide that retirement benefits are to be suspended upon the reemployment of an employee who is receiving pension benefits. Plans which provide for suspension of benefits will be required to comply with all relevant aspects of the regulations, if adopted. To the extent that this regulation would impose

specific requirements not provided for in the Act, it would have only a prospective effect on the operation of plans and the rights of employees. Suspension of benefit payments by plans prior to adoption of the regulations will be governed by section 203(a)(3)(B) of the Act without reference to the regulation.

STATUTORY PROVISIONS

Under the minimum vesting standards for employee pension benefit plans contained in section 203 of the Act, an employee's rights to benefits derived from his own contributions may never be forfeited.

* * *

However, section 203(a)(3)(B) of the Act (and section 411(a)(3)(B) of the Internal Revenue Code of 1954, as amended (Code)) permits a plan to provide that, under certain conditions, the right to an accrued benefit derived from employer contributions may be suspended for

periods during which the employee is reemployed, without such suspension being deemed an impermissible forfeiture.

For a plan other than a multiemployer plan, such benefits may be suspended upon an employee's reemployment only if such reemployment is with an employer under whose plan the benefits are being paid.

* * *

PROPOSED REGULATIONS

1. *Employed in section 203(a)(3)(B) service.* The proposed regulation provides that a pension plan may permanently withhold certain accrued benefits which would otherwise have been payable to the retiree if the retiree is employed in "section 203(a)(3)(B) service."

* * *

If it is other than a multiemployer plan, as defined in section 3(37) of the Act, benefits may be suspended by the plan only if the retiree is employed by

an employer which maintains the plan. The regulation specifies that the term "employer which maintains the plan" includes employers described in 29 CFR \$2530.210 (e) [sic] and (e). Thus, for example, members of a controlled group of corporations and commonly controlled trades or businesses may be considered to be an "employer which maintains the plan". . . .

p. 59102

* * *

STATUTORY AUTHORITY

The regulation is proposed under the authority contained in sections 203(a)(3)(B) and 505 of the Act (Pub. L. 93-406, 88 Stat. 854, 894, 29 U.S.C. 1053, 1135) and section 411(a)(3)(B) of the Code.

\$2530.203-3 Suspension of pension benefits upon reemployment of retirees.

(a) *General.* Section 203(a)(3)(B) of

the Act provides that the right to the employer-derived portion of an accrued pension benefit shall not be treated as forfeitable solely because an employee pension benefit plan provides that the payment of benefits is suspended during certain periods of reemployment which occur subsequent to the commencement of payment of such benefits. This section sets forth the circumstances and conditions under which such benefit payments may be suspended.

(b) *Suspension rules.--(1) General rule.* A plan may provide for the permanent withholding of the suspendible amount of an employee's accrued benefit for each calendar month during which an employee is employed in "section 203(a)(3)(B) service", as described in §2530.203-3(c).

* * *

(c) *Section 203(a)(3)(B) Service.--(1) Plans other than multiemployer plans.* In

the case of a plan other than a multiemployer plan, as defined in section 3(37) of the Act, the employment of an employee, subsequent to the time the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment, results in section 203(a)(3)(B) service during a calendar month if the employee, in such month, completes 40 or more hours of service, as defined in 29 CFR \$2530.200b-2(a)(1), for an employer which maintains the plan, including employers described in \$2530.210(d) and (e). . . .

p. 59103

Signed at Washington, D.C. this 13th day of December, 1978.

Ian D. Lanoff,

Administrator, Pension and Welfare

*Benefit Programs, Labor-Management
Services Administration.*

44 F.R. p.66791 (November 21, 1979)

EQUAL EMPLOYMENT OPPORTUNITY

COMMISSION

* * *

Age Discrimination in Employment;

Final Interpretations

AGENCY: Equal Employment Opportunity
Commission.

ACTION: Final interpretations.

-SUMMARY: On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978), responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, 623, 625, 626-633 and 634 (ADEA) was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The commission assumed enforcement of ADEA on that date. Prior to the transfer of

authority which occurred on July 1, 1979, the Department of Labor published for comment in the **Federal Register** proposed amendments to their existing interpretations of the ADEA. These proposed amendments included sections entitled * * * "Exemption for certain executive and high policymaking employees." Insofar as those sections have already been published for public comment, they are herein published as final interpretations of the Commission with certain changes made by the Department of Labor after careful consideration was given to the written comments on the proposed amendments.

EFFECTIVE DATE: Since the following final agency interpretations are interpretive rules or statements of policy, the 30-day delay in effective date as prescribed in Section 553(d) of Title 5 U.S. Code, does not apply. Accordingly, these interpretations are

effective November 21, 1979.

* * *

p. 66793

The Department of Labor published its proposal to add * * * a new \$860.97 (now \$1625.12) to the Interpretative Bulletin on the ADEA on December 12, 1978 (see 43 FR 58148). The purpose of these additions is to take account of an exemption in Section 12(c) of the Act which took effect on January 1, 1979, when the maximum age of individuals in the private sector and the non-Federal public sector protected by the Act was extended from age 65 to age 70. The exemption is as follows:

(c)(1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a

high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$27,000.

* * *

p. 66796

\$1625.12(k)

The proposed interpretation dealt with the statutory requirement that the annual retirement benefit be "nonforfeitable."

Commentators have expressly requested the Commission to reconcile the proposed interpretation with section 411(a)(3) of the Internal Revenue Code (26 U.S.C. 411(a)(3)). Under section 411(a)(3), retirement benefits derived from employer contributions are not treated as forfeitable solely because the plan provides that such benefits are * * *

suspended during certain periods of reemployment. * * *

The proposed interpretations did not refer to these exceptions. However, the exceptions are specifically permitted by the Internal Revenue Code (as amended by ERISA) and are not irreconcilable with the term "nonforfeitable" as used in section 12(c) of the ADEA.

Accordingly, the Commission has chosen to adopt these section 411(a)(3) exceptions in its interpretation.

* * *

p. 66797

This document was originally prepared under the direction of the Deputy Administrator, Wage and Hour Division of the Department of Labor with the assistance of the Office of the Solicitor and the concurrence of the Office of the General Counsel of the Equal Employment Opportunity Commission. In addition, in accordance with Executive Order 12067,

the Commission has solicited the views of affected Federal agencies.

Signed at Washington, D.C., this 14th day of November 1979.

For the Commission,
Eleanor Holmes Norton,
*Chair, Equal Employment Opportunity
Commission.*

Accordingly, new §§* * *1625.12, * * *
are added to Title 29, Code of Federal
Regulations.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Jan. 30, 1981
	)	Herbert T. Hope,
vs.	)	Clerk]
)	
SOUTHWESTERN BELL	)	NO. CIV-81-114T
TELEPHONE COMPANY)	
)	
Defendant.)	

COMPLAINT

COUNT I

Comes now the plaintiff and for cause
of action against the defendant alleges
and states:

* * *

[1]

* * *

JURY DEMANDED

[7]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,)	
Plaintiff,	)	[FILED
	)	9/30/81
vs.	)	Herbert T. Hope
	)	U.S. Dist. Ct.]
)	
SOUTHWESTERN BELL	)	No. Civ-81-114T
TELEPHONE COMPANY,)	
)	
Defendant.)	

PLAINTIFF'S MOTION FOR PRODUCTION
OF DOCUMENTS (RULE 34, F.R.C.P.)

Plaintiff Carl P. Caldwell requests
Defendant Southwestern Bell Telephone
Company to respond within thirty (30)
days to the following requests:

1. That defendant produce and permit
plaintiff to inspect and to copy each of
the following documents:

* * *

(23) A copy of any and all documents
issued by the defendant for the three
year period prior to November 30, 1979 in
which the defendant advised plaintiff
that the defendant considered him to be a
"bona fide executive" or in "a high

policy-making position" or words of similar import.

(24) A copy of each and every document issued by the defendant during the three year period prior to November 30, 1979 in which the defendant advised all salary grade 5A employees that they were considered by the defendant to be a "bona fide executive" or in "a high policy-making position" or words of similar import.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Nov. 2, 1981
	)	Herbert T. Hope
v.	)	Clerk]
)	
SOUTHWESTERN BELL	)	No. CIV-81-1114T
TELEPHONE COMPANY,)	
)	
Defendant.)	

DEFENDANT'S RESPONSES TO PLAINTIFF'S
MOTION FOR PRODUCTION OF DOCUMENTS

COMES NOW the defendant, in compliance with Rule 34 of the Federal Rules of Civil Procedure and responds to plaintiff's Motion for Production of Documents as follows:

* * *

RESPONSE NO. 23: Attached is a copy of all documents issued by the defendant for the three year period prior to November 30, 1979, in which the defendant advised the plaintiff that he was

considered to be a "bona fide executive" or in "a high policy-making position."

RESPONSE NO. 24: There are no documents issued by defendant advising all salary grade 5A employees that they were considered to be a "bona fide executive" or in "high policy-making position," and such is not defendant's policy.

October 11, 1979

Mr. Carl P. Caldwell

* * *

Dear Mr. Caldwell:

* * *

You will be 65 on November 19, 1979 and Section 4, Paragraph G of the Plan for Employees' Pensions, Disability Benefits and Death Benefits provides that employees referred to in Section 12 (c) (1) of the ADEA shall be retired not later than the last day of the month in which the sixty-fifth birthday occurs. Therefore, unless you wish an earlier retirement date your retirement will be effective November 30, 1979 with your pension to be effective December 1, 1979.

The three criteria used in determining that your retirement be at age 65 are as

follows:

1. The employee must be entitled to a pension of at least \$27,000, after the cost, if any, of survivor annuity option.
2. The employee must have been in his/her position for two years prior to attaining age 65.
3. The employee's present position must be an "executive," policy making one.

* * *

Sincerely,

(Signed J.W. REDDOUT)

for Assistant Vice President & Secretary,
General Employees' Benefit Committee

Southwestern Bell
1010 Pine Street
St. Louis, MO 63101

F.H. Brockman
Assistant Vice President &
Secretary, General Employees'
Benefit Committee

November 20, 1979

Mr. Carl Caldwell

* * *

Dear Mr. Caldwell:

* * *

. . . . it is the policy of
Southwestern Bell Telephone Company to
'retire employees at the age of 65 where
lawful. The Age Discrimination in
Employment Act of 1967, as amended in
1978, permits an employee to be retired

by his or her employer at the age of 65 when the employee is employed in a bona fide executive or a high policymaking position for a 2 year period preceding retirement and the employee is entitled to a pension of at least \$27,000 a year.

In your capacity as General Manager-Comptrollers for more than the preceding two years, (i.e. from January 1, 1964 to November 30, 1979, date of retirement) you had the responsibility of managing and overseeing the entire Comptrollers organization for the state of Oklahoma. Given these job duties and responsibilities, the job of General Manager-Comptrollers was and is a bona fide executive position.

* * *

Sincerely,

/s/F.H. Brockman

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Nov. 2, 1981
	)	Herbert T. Hope,
v.	)	Clerk]
)	
SOUTHWESTERN BELL)	
TELEPHONE COMPANY,)	
)	
Defendant.)	

DEFENDANT'S ANSWERS
TO PLAINTIFF'S INTERROGATORIES

COMES NOW the defendant and answers
plaintiff's Interrogatories as follows:

* * *

INTERROGATORY NO. 18: Section 9 of
the ADEA provides that the Secretary of
Labor may issue such rules and
regulations as he may consider necessary
or appropriate for carrying out the
provisions of the ADEA. By Section 2 of
the 1978 Reorganization Plan No. 1, 92
Stat. 3781, those powers were

transferred to the Equal Employment Opportunity Commission. The EEOC's interpretation of the 1978 amendment of the ADEA with respect to the exception as to "bona fide executives" and those in a "high policy-making" position are set forth in 29 CFR 1625, effective November 21, 1979. Please identify the categories (as to job titles and pay grades) the defendant has designated as being within the criteria as set forth therein, both as to bona fide executives and those in a high policy-making position.

ANSWER: The defendant has not designated by job title or pay grade those employees who are considered to be bona fide executives and/or in high policymaking positions. Generally, however, each fifth level and above employee will be considered on a case-by-case basis to determine whether the criterion of the Act apply.

* * *

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,)	
	)	[FILED
Plaintiff,	)	Jan. 26, 1982
	)	Herbert T. Hope
vs.	)	U.S. Dist. Ct.]
)	
SOUTHWESTERN BELL	)	No. Civ-81-114T
TELEPHONE COMPANY,)	
)	
Defendant.)	

AMENDMENT TO COMPLAINT AND REQUEST
OF PLAINTIFF TO FILE ADDITIONAL AMENDMENT

* * *

Comes now the plaintiff and shows to the Court that documents recently produced by defendant in response to discovery requests by plaintiff have revealed information that certain actions taken by defendant in connection with the involuntary retirement of plaintiff were in violation not only of the defendant's "Plan for Employees' Pensions, Disability Benefits and Death Benefits" as amended to January 1, 1979, but likewise in violation of applicable provisions of the Employee Retirement Income Security Act

of 1974, 29 U.S.C., Sections 1101-1381. By reason thereof plaintiff contends, in addition to the allegations of his Complaint, that his forced retirement was additionally brought about by an unauthorized and illegal effort to amend the "Plan" to encompass the provisions of Section 12(c)(1) of the ADEA with the result that said attempted amendment to the "Plan" was ineffective.

Consequently, on November 30, 1979, the defendant had no basis on which to retire plaintiff as "a bona fide executive or in a high policy making position" with the defendant. Having validly adopted no amendments relating to the exception, the defendant was required by then applicable law to not violate the ADEA Act with respect to the protected group of employees aged 40 to 70, without exception. * * *

The form of the proposed amendment is attached, together with a brief.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,)

Plaintiff,)

vs.)

SOUTHWESTERN BELL)
TELEPHONE COMPANY,)

Defendant.)

No. Civ-81-114T

[PROPOSED]
AMENDMENT TO COMPLAINT

Comes now the plaintiff and, with
permission of Court, amends his Complaint
as follows:

1. By adding, as paragraph 12(a):
"In addition, the defendant
neglected to properly amend its
'Plan for Employees' Pensions,
Disability Benefits and Death
Benefits' with reference to the
'bona fide executive or high
policy making position' exception
to the 1979 amendment to the ADEA.
For that reason, it had no legal
authority on which to base its

decision to retire plaintiff at age 65 and such act constituted a violation of the ADEA in that plaintiff had not attained the age of 70 years."

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	March 11, 1982
	)	Herbert T. Hope
vs.	)	Clerk]
)	
SOUTHWESTERN BELL	)	No. CIV-81-114-T
TELEPHONE COMPANY,)	
)	
Defendant.)	

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Southwestern Bell Telephone Company and moves the Court to grant Defendant's Motion for Summary Judgment on the issue of bona fide executive for the reasons set forth in the attached brief.

* * *

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,)	
	)	[FILED
Plaintiff,	)	May 3, 1984
	)	Herbert T. Hope
vs.	)	U.S. Dist. Ct.]
)	
SOUTHWESTERN BELL	)	No. Civ-81-114T
TELEPHONE COMPANY,)	
)	
Defendant.)	

PLAINTIFF'S MOTION TO FILE
ADDITIONAL AMENDMENTS TO COMPLAINT

FIRST AMENDMENT

COMES NOW the plaintiff and moves this Court for leave to amend his Complaint by adding the two additional paragraphs originally requested to be added by plaintiff on January 26, 1982. . . . attached hereto.) In support thereof plaintiff would show:

1. On January 26, 1982, plaintiff filed a request to file additional amendments to his Complaint, the proposed amendments, and a brief in support thereof.

2. On August 20, 1982, the Court

entered an order denying said request to amend on the basis that it was "moot" in view of the Court's decision on that same date sustaining plaintiff's Motion for Partial Summary Judgment.

* * *

WHEREFORE, plaintiff prays the attached proposed order be entered granting plaintiff's Motion to File Additional Amendments as to plaintiff's first amendment;. . .

* * *

[PORTION OF BELL'S RESPONSE TO
PLAINTIFF'S REQUEST FOR PRODUCTION OF
DOCUMENT #8 FILED NOVEMBER 2, 1981]

AT&T

American Telephone and
Telegraph Company

295 North Maple Avenue
Basking Ridge, N.J. 07920

EMPLOYEES' BENEFIT COMMITTEE

* * *

May 24, 1978

TO ALL BENEFIT SECRETARIES:

I would like to share with you recent
developments regarding the federally
legislated change in the mandatory
retirement age.

At the Presidents' Conference held the
first week in May, Mr. E.W. Clarke, Jr.

discussed the issues and recommendations
as stated in the attached presentation.

* * *

Sincerely,

/s/Therese F. Pick

["Attached Presentation" to May 24,
1978 letter from Therese F. Pick]

MANADATORY RETIREMENT AGE ISSUE

IN APRIL, LEGISLATION WAS SIGNED BY THE
PRESIDENT WHICH OFFICIALLY RAISES THE
PREMISSIBLE MANDATORY RETIREMENT AGE FROM
65 TO 70 YEARS OF AGE. PL 95-256 AMENDS
THE AGE DISCRIMINATION IN EMPLOYMENT ACT
(ADEA) OF 1967. ESTIMATES AS TO THE
NATIONAL IMPACT OF THIS LAW HAVE
INDICATED THAT PERHAPS 200,000 EMPLOYEES
COULD BE AFFECTED. THE BELL SYSTEM SHARE
OF THIS TOTAL IS EXPECTED TO BE MINIMAL.
PRESENTLY ONLY 20-25% OF THOSE RETIRING
LEAVE AT AGE 65. IT IS NOT ANTICIPATED
THAT SUBSTANTIAL NUMBERS OF EMPLOYEES,
WHEN PERMITTED TO DO SO, WILL RETIRE
AFTER AGE 65. HOWEVER, WE DO ANTICIPATE
DIFFICULT ADMINISTRATIVE PROBLEMS AND

PROBABLY SOME LITIGATION.

* * *

IN REVIEWING THE CHANGES, SEVERAL INTERESTING PROVISIONS HAVE BEEN INCLUDED, ONE OF WHICH, THE EXECUTIVE EXEMPTION, WAS BROUGHT ABOUT AT THE URGING OF THE CONGRESS AND SENATE BY THE BUSINESS COMMUNITY, A PROCESS INTO WHICH WE HAD SOME INPUT.

IT STATES THAT "BONA-FIDE EXECUTIVES OR HIGH POLICY MAKING EMPLOYEES" MAY CONTINUE TO BE TREATED UNDER A MANADATORY AGE 65 RETIREMENT POLICY, PROVIDED THAT SUCH INDIVIDUALS HAVE OCCUPIED SUCH A POSITION FOR A PERIOD OF AT LEAST TWO YEARS AND ARE CURRENTLY ENTITLED TO A COMPANY-PAID RETIREMENT BENEFIT OF AT LEAST \$27,000 PER YEAR.

ASSUMING AN AVERAGE OF 40 YEARS' COMPANY SERVICE FOR THIS AGE GROUP, UNDER THE PRESENT PENSION FORMULA, A \$27,000

PENSION WOULD REQUIRE A FIVE YEAR AVERAGE SALARY OF APPROXIMATELY \$52,000.

THEREFORE, PROBABLY ALL CURRENT 5TH LEVEL EMPLOYEES AND PERHAPS, LATER, SOME 4TH LEVEL INDIVIDUALS WILL QUALIFY.

(CURRENTLY AT&T, LONG LINES, NEW YORK TELEPHONE AND BELL TELEPHONE COMPANY OF PENNSYLVANIA HAVE 4TH LEVEL CONTROL RATES ABOVE \$52,000). SINCE THE \$27,000 FIGURE IS NON-ESCALATING WE WILL HAVE IN THE FUTURE AN INCREASING NUMBER OF PERSONS WITH A PENSION OF THAT AMOUNT.

THERE IS SOME TROUBLE WITH THE DEFINITION OF "EXECUTIVE" AS IT APPLIES IN THIS INSTANCE. THERE ARE VARIOUS METHODS OF APPROACHING THE DEFINITION. THE STATUTE HAS STATED THAT THE FLSA (FAIR LABOR STANDARDS ACT) DEFINITION, SHOULD BE APPLIED.

* * *

OUR INTENT HERE IS TO UTILIZE THE \$27,000 EXECUTIVE EXEMPTION PROVISION FULLY. WE

MAY, HOWEVER, AT SOME POINT BE CHALLENGED
ON OUR APPROACH. FOR INSTANCE, FINAL
REGULATIONS, WHEN WRITTEN MAY EXCLUDE OUR
4TH LEVEL PEOPLE FROM CONSIDERATION AS
"EXECUTIVES". * * *

[Portion of Bell's Response #3 to
Caldwell's Request for Production of
Documents, Filed November 2, 1981]

MINUTES

SOUTHWESTERN BELL TELEPHONE COMPANY
GENERAL EMPLOYEES' BENEFIT COMMITTEE
SPECIAL MEETING DECEMBER 20, 1978

A special meeting of the General
Employees' Benefit Committee was held at
2:00 p.m., Wednesday, December 20, 1978,
Room 2408, Telephone Building, Saint
Louis, Missouri.

Presiding: Mr. H.D. Schodde

Present: Mr. J.C. Denny
Mr. J.F. Haake

Secretary: Mr. F.H. Brockman

* * *

Advisor: Mr. W.C. Sullivan

The Committee considered the Chairman's proposed changes in the Plan for Employees' Pensions, Disability Benefits and Death Benefits. Whereupon, it was:

RESOLVED: That upon consent of the President, the Plan for Employees' Pensions, Disability Benefits and Death Benefits be and hereby is amended effective January 1, 1979, in accordance with Committee's report to the President dated December 20, 1978, dealing with the 1978 amendments to the Age Discrimination in Employment Act; subject to such changes, including retroactive changes as may be necessary to obtain an Internal Revenue Service ruling that the Plan and trust are qualified and exempt under the

Internal Revenue Code and such other changes as may be necessary to comply with applicable law; provided, however, that if the Internal Revenue Service determines the Plan is not qualified and exempt by reason of any said amendments, then in such event said amendment or amendments shall be of no force and effect.

On recommendation of the Chairman, it was voted that the Chairman be authorized to send the President a letter, copy of which is attached, recommending the changes in the Plan for Employees' Pensions, Disability Benefits and Death Benefits, with the request that the President submit the changes to the Board of Directors for consideration.

ADJOURNED:

Approved:

/s/ F.H. Brockman
Secretary

/s/ H.D.Schodde
Chairman

[Portion of Bell's Response #3 to Caldwell's Request for Production of Documents. Filed 11/2/81.]

St. Louis, December 20, 1978

MR. BARNES:

The Benefit Committee requests your consent to make several amendments to the Plan for Employees' Pensions, Disability Benefits and Death Benefits (the "Plan") to conform to the change in the mandatory retirement age from age 65 to age 70 that will become effective January 1, 1979 for all employees of this Company except those covered by the Executive Exemption under Section 12 (c) (1) of the Age Discrimination in Employment Act as amended in 1978.

Attached is a summary of the principal amendments to the Plan to be effective January 1, 1979. Although these amendments become effective January 1, 1979, they will remain subject to future change to conform to Department of Labor

regulations which are expected to be issued next year or to conform to Internal Revenue Service findings regarding Plan qualification. In addition, the implementation of the change in the mandatory retirement age and the application of the Executive Exemption are subject to further changes to conform to state statutes dealing with age discrimination in employment.

Since the proposed changes are either required or made desirable by the 1978 amendments to the Age Discrimination in Employment Act, it is the Committee's opinion that these changes require only your consent and not additional approval of the Board. The proposed Plan changes have been discussed with the labor union representing our employees.

Employees' Benefit Committee

/s/ H.D. Schodde

Chairman

Approved:

/s/ Z.E. Barnes
President

12-21-78
Date

[Portion of Bell's Pension Plan Dated Jan. 1, 1979 and Produced by Bell on Jan. 12, 1982 in Response to Caldwell's Request for Production of Documents and Filed in the Trial Court.]

SECTION 4. PENSIONS

1. Eligibility

* * *

g. Mandatory Retirement Age

Each employee shall be retired from active service, whether or not he is eligible for a pension, not later than the last day of the month in which his seventieth birthday occurs except as otherwise provided by applicable state law and except those employees referred to in Section 12(c)(1) of the ADEA who shall be retired not later than the last day of the month in which the sixty-fifth birthday occurs* * *

* * *

6. Payment Treatment During Subsequent
Bell Employment

Regular employment with this Company or with any company with which arrangements for interchange of benefit obligations, as described in Section 9 of these Regulations, have been made directly or indirectly, shall suspend the right of a retired employee * * * to pension payments during the period he continues in such employment. If the employee's prior service with this Company is included with such employment as part of his term of employment in the grant of a new pension, any previous eligibility for a pension hereunder shall cease.

* * *

SECTION 9. INTERCHANGE OF BENEFIT
OBLIGATIONS

Agreement may be made by this Company with the American Telephone and Telegraph

Company for an interchange with that Company and its Associated or Allied Companies of the benefit obligations to which such Companies may be subject under plans for employees' pensions, disability benefits and death benefits. The general provisions of such agreement will be:

* * *

b. Transfer of Service Credit

That an employee's term of employment, as hereinbefore defined, shall include employment not only in this Company and the American Telephone and Telegraph Company, but also in any other Company with which reciprocal agreements under this Plan shall have been made by the American Telephone and Telegraph Company.

* * *

SECTION 10. CHANGES IN PLAN

The Committee, with the consent of the President, and subject to the approval of the Board of Directors (or without such approval in the case of changes which, in the opinion of the Committee, are dictated by requirements of federal or state statutes applicable to the Company or authorized or made desirable by such statutes) may from time to time make changes in the Plan set forth in these Regulations, and the Company may terminate said Plan, but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder.

[Portion of Bell's Organization Chart
Only Reflecting Caldwell's Chain of
Command & Employees Under Each Manager
in that Chain of Command, Produced by
Bell in Response to Caldwell's Request
for Production of Documents and Filed in
the Trial Court on November 2, 1981]

ORGANIZATION CHARTS

COMPANY HEADQUARTERS

SOUTHWESTERN BELL TELEPHONE COMPANY

APRIL 1, 1979

PRESIDENT

Zane E. Barnes (95,273)

VICE PRESIDENT-FINANCE AND

COMPTROLLER

Louis C. Bailey (4,852)

* * *

DIRECTOR COMPTROLLERS

OPERATIONS

Robert N. Schoonmaker (3,655)

GENERAL MANAGER-COMPTROLLERS

Carl Caldwell (433)

Oklahoma Area

[Portion of Bell's Organization Chart
Reflecting Chain of Command for Parsons
& Above, Produced by Bell in Response to
Caldwell's Request for Production of
Documents and Filed in the Trial Court on
November 2, 1981]

ORGANIZATION CHARTS

COMPANY HEADQUARTERS

SOUTHWESTERN BELL TELEPHONE COMPANY

APRIL 1, 1979

PRESIDENT

Zane E. Barnes (95,273)

EXECUTIVE VICE PRESIDENT

Joe H. Hunt (89,706)

VICE PRESIDENT-OKLAHOMA

John R. Parsons (9,813)

[List of Bell's 15 Vice Presidents in Organization Charts, Produced by Bell in response to Caldwell's Request for Production of Documents and Filed in the Trial Court on November 2, 1981.]

ORGANIZATION CHARTS

COMPANY HEADQUARTERS

SOUTHWESTERN BELL TELEPHONE COMPANY

APRIL 1, 1979

VICE PRESIDENT-FINANCE AND COMPTROLLER

Louis C. Bailey (4,852)

VICE PRESIDENT, GENERAL COUNSEL

AND SECRETARY

Wayne E. Babler (155)

EXECUTIVE VICE PRESIDENT

Joe H. Hunt (89,706)

VICE PRESIDENT

Don L. Smith (232)

VICE PRESIDENT

Band D. Schodde (222)

VICE PRESIDENT

Stuart R. Trottmann, Jr. (91)

SENIOR VICE PRESIDENT-BUSINESS

James P. Haake (4,121)

VICE PRESIDENT-RESIDENCE AND PUBLIC
SERVICE

James R. Adams (864)

VICE PRESIDENT-NETWORK

Ross H. Spicer (449)

VICE PRESIDENT-ARKANSAS

James B. Nichols (5,524)

VICE PRESIDENT-KANSAS

John E. Hayes, Jr. (5,956)

VICE PRESIDENT-MISSOURI

R. Ray Shockley (14,295)

VICE PRESIDENT-OKLAHOMA

John R. Parsons (9,813)

VICE PRESIDENT-TEXAS

Doyle E. Rogers (47,674)

VICE PRESIDENT-SALES OPERATIONS (North
Region)

James C. Denny (1,743)

INTERNAL REVENUE SERVICE

* * *

PLAN PLAN FOR EMPLOYEES PENSIONS
NAME DISABILITY BENEFITS AND DEATH
 BENEFITS

CASE NO 13911502EP

CONTROL DATE 04-12-79

FORM NO 5300

EMP ID NO 43-0529710

PLAN NO 001

FILE NO 130004588

SOUTHWESTERN BELL TELEPHONE COMPANY

* * *

JUL 11 1979

Dear Applicant:

Based on the information supplied, we have made a favorable determination on your application identified above. Please keep this letter in your permanent records.

* * *

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

* * *

Sincerely yours,

file
/s/Charles H. Brennan

DISTRICT DIRECTOR

[Portion of Response No. 8 to Bell's
Response to Caldwell's Production of
Document Request Filed on November 2,
1981]

November 6, 1978

Interim Guidelines for Application
of the
Executive Exemption Under ADEA

* * *

- A. Based on the following
descriptions of a bona fide
executive and a high policymaking
position as contained in the
conference Report of the U.S.
Congress, generally all fifth
level employees and above will be
covered under the Executive
Exemption provided:

* * *

[Portion of Bell's Brief in Support of
its Motion for Summary Judgment filed
3/11/82.]

* * *

The fifth level of management is also
referred to as the "department head"
level. The officer level is sometimes
also referred to as level six.

* * *

**[REPRESENTATIVE SAMPLE OF PORTION OF
INTERCHANGE AGREEMENTS BETWEEN ALL
INTERCHANGE COMPANIES INCLUDING BELL AND
ATTACHED AS AN EXHIBIT TO 3/19/82
AFFIDAVIT OF THERESE PICK OF AT&T & FILED
IN THE DISTRICT COURT]**

The American Company agrees that, in determining under its Plan the term of employment of persons who have been or hereafter shall become employees of the Southwestern Bell Company, and who subsequently have entered or shall enter the employment of the American Company, it, the said American Company, will allow full credit for the period of employment which, at the termination of the employee's service with the Southwestern Bell Company, constituted his term of employment under the Plan of that Company; subject, however, to the following conditions:-

- (a) The credit above described will be allowed at the time the employee enters the service of the American Company in cases in

which the employee's service with that Company is continuous with service with the Southwestern Bell Company, or is continuous with other service which the American Company credits at that time in determining term of employment under its Plan, such other service being continuous with service with the Southwestern Bell Company.

* * *

Notice of 1985 Annual Meeting
and Proxy Statement

Southwestern Bell
Corporation

Executive Compensation

The following table sets forth all cash compensation paid or accrued during the year ended December 31, 1984, for services rendered during 1984 in all capacities to the Corporation and its subsidiaries for the five most highly compensated executive officers of the Corporation, and of all executive officers as a group.

	Capacities		Short Term
	In Which	Annual	Incentive
<u>Name</u>	<u>Served</u>	<u>Salary</u>	<u>Plan Award*</u>
Zane E.	Chairman	\$475,000	\$375,000
Barnes	of the		
	Board,		
	President		

& Chief
Executive
Officer

* * *

The Corporation has separate non-contributory pension plans for management and non-management employees. Under the management pension plan, retirement is mandatory at age 65† for officers and other executives;

* * *

†On January 22, 1985 the Board of Directors requested that Mr. Barnes continue as Chairman and Chief Executive Officer of the Corporation through the end of 1989. Mr. Barnes will reach the normal retirement age of 65 in 1986.

[Portion of Bell's Jan. 12, 1982 Response #4 to Caldwell's Production of Document Request Filed in the District Court. Column entitled "Number of Subordinates" is Abbreviated to read "No. of Subord." and words "Assistant Vice President" are abbreviated to read "Asst. Vice Pres." in order to allow document to be reproduced within Supreme Court spacing requirements.]

<u>NAME</u>		<u>JOB TITLE</u>	<u>NO. OF SUBORD.</u>
Ames	HD	Asst. Vice Pres.	85
Ayers	JE	General Manager	3025
Bailey	JC	General Manager	255
Bates	RC	General Manager	570
Beckstead	RF	General Manager	337
Bock	WE	General Manager	630
Bowen	JF	General Manager	1461
Browning	JD	General Manager	2526
Caldwell	CP	General Manager	433
Callaway	JW	General Manager	279
Carroll	MA	General Manager	363
Castle	TR	General Manager	1199
Charpentier	DW	Asst. Vice Pres.	131
Coffman	JD	Asst. Vice Pres.	716
Davis	TC	General Manager	2923
Davison	ML	Asst. Vice Pres.	1
Dickerson	CR	General Manager	2096
Dimmitt	LA	General Attorney	11
Douglass, Jr	RS	General Manager	282
Duke	WN	Asst. Vice Pres.	166
Eickhoff, Jr	LE	General Attorney	6

<u>NAME</u>		<u>JOB TITLE</u>	<u>NO. OF SUBORD.</u>
Ellis	JD	General Attorney	14
Ellis	JB	General Manager	457
Flath	JC	General Manager	2297
Free	WJ	General Attorney	11
Gaubatz	EL	Asst. Vice Pres.	19
Gibson	GT	General Manager	3166
Golden	JS	General Attorney	4
Griep	WA	General Manager	1578
Griffin	LR	General Manager	2379
Hall	WT	General Manager	2901
Hand	JH	General Attorney	17
Harris	RA	Asst. Vice Pres.	21
Hatter	RJ	General Manager	192
Holigan	H	General Manager	1666
Jones, Jr.	H	Asst. Vice Pres.	56
Keith	JE	Asst. Vice Pres.	93
Kopf	ML	General Manager	732
Lance	BC	Asst. Vice Pres.	598
Lawrence	JD	General Attorney	3
Lemay	RT	Asst. Vice Pres.	21
Little	WA	Asst. Vice Pres.	125

<u>NAME</u>		<u>JOB TITLE</u>	<u>NO. OF SUBORD.</u>
Macha	R	General Manager	495
Mazur	JA	General Manager	653
McElroy	RL	Asst. Vice Pres.	654
McIntyre	KJ	General Manager	1912
Meers	WW	General Manager	2345
Parker	PJ	General Manager	1943
Rahoy	JD	General Attorney	5
Robbins	C	General Manager	2994
Shatto	JM	General Attorney	15
Sheppard, Jr	WP	General Manager	3420
Sparks	RT	General Manager	4384
Stuckey	NS	General Manager	1925
Taylor	JE	General Attorney	7
Walker	JR	General Manager	3852
Wegner	RJ	General Manager	1731
White	RW	General Manager	2603
Zimmerman, Jr	LW	General Manager	4097
Andrews	WB	Asst. Vice Pres.	413
Arms	RM	Asst. Vice Pres.	448
Arnold	JM	Asst. Vice Pres.	54
Barone	JL	Asst. Vice Pres.	7

<u>NAME</u>		<u>JOB TITLE</u>	<u>NO. OF SUBORD.</u>
Baxter	ND	Asst. Vice Pres.	30
Berry	FW	Asst. Vice Pres.	17
Bettis	ZF	Asst. Vice Pres.	16
Bouldin	JS	General Manager	1472
Boutin	CR	Asst. Vice Pres.	54
Brockman	FH	Asst. Vice Pres.	21
Brunworth	W	Asst. Vice Pres.	110
Bryant	WG	Asst. Vice Pres.	7
Caldwell	RS	Asst. Vice Pres.	772
Carothers	LC	Asst. Vice Pres.	178
Cathey	SB	Asst. Vice Pres.	12
Coonan	LS	General Attorney	9
Costello	JE	Asst. Vice Pres.	61
Crice	HE	Asst. Vice Pres.	45
Davis	J	Asst. Vice Pres.	22
Dreyer	WE	General Manager	2060
Dupre	DD	General Attorney	8
Earhart	RG	General Manager	904
Everitt	EM	Asst. Vice Pres.	52
Fries	ID	General Manager	732
Fuller	BF	Asst. Vice Pres.	17

<u>NAME</u>		<u>JOB TITLE</u>	<u>NO. OF SUBORD.</u>
Gilliam, Jr	NF	Asst. Vice Pres.	83
Glaser	RH	Asst. Vice Pres.	4
Hall	JF	Asst. Vice Pres.	50
Hammer	ML	Asst. Vice Pres.	27
Hargis	WC	Asst. Vice Pres.	72
Hatch	JF	Asst. Vice Pres.	181
Haydon	WC	General Manager	300
Haywood, Jr	SR	General Manager	2593
Heger	FL	Asst. Vice Pres.	202
Hudson	LH	General Manager	238
Jordan	WH	General Manager	212
Kaufman	KC	Asst. Vice Pres.	30
Keltner	KW	General Manager	1249
Kice, Jr	EE	Asst. Vice Pres.	76
Klein	MA	Asst. Vice Pres.	62
Long	RA	Asst. Vice Pres.	46
Lottmann	DC	Asst. Vice Pres.	17
Maranto	SP	Asst. Vice Pres.	18
Maus	RM	Asst. Vice Pres.	151
Miller	AO	Asst. Vice Pres.	51
Miller, Jr	GE	Asst. Vice Pres.	60

<u>NAME</u>		<u>JOB TITLE</u>	<u>NO. OF SUBORD.</u>
Mitchell	PP	Asst. Vice Pres.	357
Moore, Jr	EP	Asst. Vice Pres.	82
Murphy	EC	Asst. Vice Pres.	14
Nease	JD	Asst. Vice Pres.	87
Payne	CB	Asst. Vice Pres.	1
Phillips	JB	Asst. Vice Pres.	2
Powers	RL	General Manager	972
Randle	JL	General Attorney	1
Rascher	LA	Asst. Vice Pres.	36
Schenck	FP	General Manager	355
Schmidt	WE	Asst. Vice Pres.	262
Schodde	RL	General Manager	1815
Seyler	RE	Asst. Vice Pres.	313
Shaffer	DW	Asst. Vice Pres.	1087
Terrell	GE	Asst. Vice Pres.	22
Vehige	RJ	Asst. Vice Pres.	271
Wade	DE	General Manager	204
West	CM	Asst. Vice Pres.	537
Whitton, Jr	RM	General Manager	2520
Wilcox, Jr	ME	General Manager	774
Wilson, Jr	JB	Asst. Vice Pres.	55

<u>NAME</u>	<u>JOB TITLE</u>	<u>NO. OF SUBORD.</u>
Withers	JO Asst. Vice Pres.	58

/

CERTIFICATE OF SERVICE

Joseph A. Claro, a member of the Bar of this Court hereby certifies that on the 30th day of August, 1989, three copies of the above and foregoing instrument were deposited in a United States Mail box, with first-class postage prepaid, and addressed to counsel of record for respondent, at said counsel's post office address as follows:

Mona S. Lambird, Esq.
Andrews, Davis, Legg
Bixler, Milstein and Murrah
500 West Main
Oklahoma City, OK 73102

Respondent is the only party required to be served herewith.

Joseph A. Claro

(3)
No. 89-380

Supreme Court, U.S.

FILED

OCT 10 1989

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

CARL P. CALDWELL,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT**

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QUESTIONS PRESENTED

All issues on which certiorari is sought have their root in a federal statutory claim that the mandatory retirement on November 30, 1979 of the then sixty-five year old Carl Caldwell, who had for, at least, seventeen years prior to that time served as the department head of the controller's operation for the state of Oklahoma for Southwestern Bell Telephone Company did not come within the 1978 enacted exception to the Age Discrimination in Employment Act for a "bona fide executive" retirement at age 65, 29 U.S.C. §631(c)(1).

1. Did the provision in Bell's pension plan in 1979 which required the suspension of benefits payments to a retiree during periods of reemployment within the AT&T group of companies technically render petitioner's benefits "forfeitable" so that Bell could not lawfully use the Section 631(c)(1) exception to the ADEA even though AT&T owned more than 80% of the stock of 34 of the 37 companies, no suspension of benefits because of reemployment was ever experienced with the three less than 80% owned companies and the 80% ownership test was contained in merely proposed regulations?

2. The trial court determined, on Bell's motion for summary judgment, that Mr. Caldwell was employed in a "bona fide executive capacity" within the meaning of the ADEA exception codified at 29 U.S.C. §631(c)(1). The court of appeals affirmed. The petitioner claims that he was improperly denied a jury trial although the issue is primarily one of statutory interpretation and no new material disputed facts are identified.

QUESTIONS PRESENTED (Cont.)

3. The trial court twice denied the plaintiff's untimely leave to amend its complaint to permit the complaint of alleged deficiencies in Bell's procedures in amending its pension plan after the 1978 amendments to ADEA. The court of appeals affirmed the trial court's denials of Caldwell's applications for leave to amend his complaint.

RESPONDENT'S AFFILIATED CORPORATIONS

SOUTHWESTERN BELL TELEPHONE COMPANY

Parent: Southwestern Bell Corporation

Affiliates: SBC Administrative Services, Inc.
 SBC Asset Management, Inc.
 The Golf Club of Oklahoma, Inc.
 Majestic Associates
 SBC Corporate Services, Inc.
 Gulf Printing Company
 Times Journal Publishing Company
 Metromedia Paging Services, Inc.
 Autophone of San Antonio, Inc.
 Southwestern Bell Mobile Systems, Inc.
 Incorporated in Delaware
 Incorporated in Virginia
 Southwestern Bell Publications, Inc.
 Southwestern Bell Yellow Pages, Inc.
 Southwestern Bell Media, Inc.
 Mast Advertising and Publishing, Inc.
 Blake Publishing Company, Inc.
 AD/VENT Information Services, Inc.
 Southwestern Bell Telecommunications, Inc.
 SBC Technology Resources, Inc.
 Southwestern Bell Corporation-Washington, Inc.
 St. Louis Health Center, Inc.
 Southwestern Redevelopment Corporation
 II
 Bell Communications Research, Inc.

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STATEMENT

This case arose out of petitioner's complaint of being forcibly retired at age 65 under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (ADEA). The courts below made several interpretative rulings involving the application of statutory and regulatory phrases such as "nonforfeitable", "bona fide executive", and "employer who maintained the plan" to the undisputed facts of petitioner's job and pension.

The trial court found that petitioner had been employed in a "bona fide executive capacity" within the meaning of 29 U.S.C. §631(c)(1), but that the pension benefits were not "nonforfeitable" within the meaning of that Section of the ADEA and the counterpart sections of the Code and ERISA, 26 U.S.C. §411(a)(3)(B) and 29 U.S.C. §1563(a).

The court of appeals affirmed the district court's holding on the applicability of the statutory phrase "bona fide executive" to petitioner's job but reversed on the statutory and regulatory meaning of the statutory terms "nonforfeitable" and "employer who maintained the plan" as they applied to AT&T's pension plan. The court of appeals held that on November 30, 1979:

"it was simply impossible to derive firm definitions from the language of §411(a)(3)(B) of the Code or §203(a)(3)(B) of ERISA, 29 U.S.C. §1053(a)(3)(B) when the perimeters of such definitions were left by the same statutes to future action by the Secretary of Labor in regulations promulgated for the purpose." (Ct. App. Op., App. pp. 28 and 29)

The court

"declined to hold Bell on November 30, 1979, to the technical exactitude of regulations which became effective on January 1, 1982, and retroactively to disqualify its plan provision where none of the regulatory agencies have seen any reason to reach such a conclusion." (Ct. App. Op., App. pp. 45 and 46)

Continuing, the court of appeals said

"it would subvert the intent of the rule-making process, and ignore the realities of the extremely broad powers given to and being exercised by the Department of Labor with respect to defining the scope of these nonforfeitability provisions." *Id.*

Respondent opposes the petition as there is no reason for further review of this matter. The lengthy and well reasoned unanimous opinion of the Tenth Circuit rests on close analysis and sound reasoning. The court observed in its Order and Judgment that the case had "no precedential value and shall not be cited or used by any court". Additionally, the court observed that the "case presents a non-recurring issue since it is confined to periods prior to 1982." Respondent is aware of no conflicting decisions, no novel or important principles of law and no elements of great public interest.

Generally, Caldwell alleges that he was involuntarily and illegally retired at the age of 65 because of Bell's misapplication of the newly-enacted bona fide executive exception to his job. He urges that he was entitled to remain employed until he would have been 70 years of age. Petitioner has been in continuous receipt of his vested Bell pension benefits from 1979 through the present as well as Social Security retirement benefits.

On November 30, 1979, Carl Caldwell, having that month become 65 years of age, was retired from the position of General Manager-Comptrollers, State of Oklahoma, Southwestern Bell Telephone Company ("Bell"), after having held that department head job for seventeen years and after 44 years of service with the company. His annual expense budget was \$7.5 million in 1976. When he retired, 441 employees reported directly to him. He was one of nine department heads who together with the General Manager for the State, an officer, operated the Oklahoma company, the State's largest private employer.

Defendant is a five-state regional operating telecommunications company. Prior to divestiture in 1984 and at the time of the commencement of this action, it was a wholly owned subsidiary of AT&T and the former employer of the plaintiff.

The following summarizes Bell's position on the three questions on which Petitioner Caldwell seeks this court's grant of the writ:

1. Defendant's pension plan benefits were at all times "nonforfeitable" as required by ADEA, ERISA and the Code. Neither the statutes nor the proposed regulations required the plan, on November 30, 1979, to alter the interchange of benefits provision which had been a standard part of the plans for AT&T system companies since 1913. The deletion of the two companies which AT&T owned less than 80% of their stock (and thus, did not come within the definition of "controlled group of corporations") from the suspension on reemployment reciprocal benefits in 1982 was done by amendment to the pension plan promptly when controlling regulations were

published in "final" form and the 1982 effective date for affected plans was established by publications of the Secretary of Labor and the Internal Revenue Service. (Ct. App. Op., App. pp. 36 and 37 and citations contained there and App. F)

2. The ADEA statutory phrase "employee employed in a bona fide executive capacity" found at 29 U.S.C. §631(c)(1) as further defined in regulations found at 29 C.F.R. §541.1 and 29 C.F.R. §1625.12 unmistakably applies to petitioner's position as one of nine department heads for Bell's Oklahoma operation. Petitioner urged that the only "officer" of Bell in Oklahoma was also the only "bona fide executive." The district court's grant of summary judgment as affirmed by the court of appeals, acted in consonance with this court's established principles for the granting of summary judgment. No further review is necessary as there are no issues of material fact and substantive law was correctly applied.

3. Petitioner's claim that the courts below abused their discretion in twice not allowing his untimely amendment to the complaint should not be the basis for granting the writ. Petitioner raises, for the first time in his petition to this court, an alleged failure of review by Bell's board of directors in adopting in 1978, amendments to the pension plan made necessary or desirable because of changes in the law brought about by the amendment of ADEA making mandatory retirement at age 65 illegal. Petitioner's application to the district court seeking a right to amend the complaint identified only generally that the "plan was not properly amended." A review of the excerpts from the record contained in petitioner's

appendix shows no indication of the board of directors issue having been argued below. (See Pet. App. p. 158 and 163. See also the applicable sections of petitioner's brief in chief to the court of appeals reproduced as App. D hereto.) Petitioner's position ignores the language of Bell's plan, the overall content of the Benefit Committee minutes, the letter attachment to the minutes, the committee's formal resolution and the action of Bell's president. The records were furnished to Caldwell and to the court and were contained in the record available to the lower court prior to the court's ruling that the interest of justice did not require the granting of either of plaintiff's leaves to amend the complaint. Respondent respectfully urges that this court should leave those decisions undisturbed as no abuse of discretion has been shown.

ARGUMENT

The opinion of Judge Anderson for a unanimous Tenth Circuit was drafted in considerable detail and carefully addresses the issues for which the writ is sought. No real purpose will be served by a reiteration of the exposition of fact and interpretation of law on both the pension "forfeitability" and "bona fide executive" issues of statutory construction of the opinion reproduced in the first 56 pages of petitioner's Appendix. Reference is made to that opinion as a foundation and point of beginning for framing the controversy.

I.

Pension Benefits Were "Nonforfeitable"

The court of appeals described as something of a labyrinthine process the testing of "nonforfeitability" of §631(c)(1) against Bell's suspension of payments provision. (App. p. 19) The process leads to several statutes and the actions of the EEOC, the Labor Department and the Internal Revenue Service which occurred between the enactment of ERISA in 1974 and the adoption of "final" regulations on permissible suspensions effective in 1982. Bell was closely attuned to the rule making process to insure their plan's highly important qualified status. A review of Bell's pension manager's letter to the U.S. Department of Labor even forms a part of the reasoning used by the court in explaining its conclusions. (App. B) The court also observed that this petitioner at all times received pension benefits and never faced and never will face any realistic possibility of forfeiture. (Ct. App. Op., App. 16).

Comment on some of petitioner's arguments nonetheless seems appropriate.

First, at page 6 of the Petition it is stated that the court of appeals acknowledged that Bell's pension benefits were *not* "nonforfeitable" as required by 29 U.S.C. §631(c)(1). To the contrary, the court of appeals refused to interpret §631(c)(1) as requiring in 1979 the standard of the proposed regulations which were adopted and made effective by the regulations of the Secretary of Labor for plan years beginning in 1982. Contrary to petitioner's assertion, there is no statutory plain meaning to be given

to the phrase "forfeitable" as applied to permissible suspensions. In pension matters it has been and is still the law that suspensions during reemployment with "the employer who maintained the plan" are permissible.

Indeed, suspensions on reemployment by a Bell retiree with any of the 34 of the 37 companies in the system in 1979 was permissible even after the final regulations were adopted and Bell's plan was amended in 1982. Thus, petitioner's citation at page 7 to doctrines of this court in its decision last term in the case of *Public Employees Ret. Sys. of Ohio v. Betts*, 109 S.Ct. 2854 (1989) is misplaced. In *Betts* this court interpreted the meaning of the word "subterfuge" in 29 U.S.C. §623(f)(2) of the ADEA and reaffirmed its 1977 ruling that a plan adopted prior to the enactment of the ADEA cannot be a subterfuge. Such a plan does not violate the Act unless it discriminates in a manner forbidden by the substantive provisions of the Act.

Betts also held that cost justification standards for age differentiated benefits contained in EEOC regulations as a means of satisfying the statute's "subterfuge" test must be stricken as in conflict with the statute. Caldwell has not contended, nor in good conscience could he contend, that the distinction between permitted suspensions during reemployment among a "controlled group of corporations" and that slightly more expansive definition sought by Bell of companies who had an interchange of benefits agreement operates to discriminate against employees because of their age. Caldwell claims no substantive violation of ADEA by operation of the pension benefits suspensions. Nor does Caldwell urge that the Department of Labor regulations, finally adopted in 1982, were in conflict.

Just the opposite. The argument seems rather to be that because both the proposed and final regulations adopted the statutory "controlled group" test, Bell and others should have known and should have been held to that standard of law, apparently, from the date of statutory enactment. Caldwell's argument is one of timing, not substantive age discrimination and therefore, *Betts* does not have the application Caldwell suggests. Like the plan in *Betts*, however, Bell's interchange of benefits arrangements for the plans of the reciprocating companies date in some cases to 1913, long before the enactment of the statute in dispute. That arrangement cannot be a "subterfuge."

Petitioner's principle argument seems to be that since the Labor Department regulations on permissible suspensions, could not be and were not in conflict with the statutory terms "nonforfeitable" and "employer who maintained the plan" that the rule stated in the proposed regulations was applicable from 1978 and Bell's plan in 1979, at that time of petitioner's retirement, contained the possibility of an impermissible suspension.

This argument is addressed by the court of appeals in its first point. (App. 38):

"First, it was apparent at the time of enactment that the interpretation of the nonforfeitability requirement in §631(c)(1) was not to be confined to the words of that statute itself. The statute fell within the context of similar ERISA and tax provisions. In acknowledgement of that fact, the EEOC expressly tied the interpretation of forfeitability under §631(c)(1) to criteria set forth in the tax statute (§411(a)(3)(B)). That statute was, in turn, subject to interpretation by the Department of Labor, as was its counterpart in ERISA."

It is uncontroverted that regulatory agencies cannot change the meaning of statutes by issuing overriding regulations. However, it is equally uncontroverted that Congress can and does, from time to time issue rule making authority to agencies and such is the case here. See §411(a)(3)(B). It is because of this specific Congressional grant of rule making authority including the direction to define "employer" that causes petitioner's reliance on the general definition of nonforfeitability in 29 U.S.C. §1002(19) not to be helpful.

Petitioner urges for the first time to this court, that regulations defining "accrual of service," apparently published in 1976, somehow were definitive of the suspension of benefits during reemployment issue. Borrowing a definition in the way petitioner suggests and urging its use by analogy is not consistent with pension law as applied by the IRS and the DOL. Additionally, "accrual of service benefits" during employment is not the same problem as "forfeitability of benefits" after active employment ceases. For example, recognition of "years of service" for accrual purposes is permitted, if not encouraged, among and between reciprocating companies (including Bell's interchange companies) because to do so confers benefits to transferring employees. Suspensions after retirement, arguably, take away benefits. Thus, after 1982, Bell's employees continued to receive service credits with the minority owned or non-control group interchange companies while suspensions of benefits during periods of reemployment with those same companies were deleted by amendment.

Petitioner asserts the court of appeals' theories to be "novel." In order, the six numbered points of the opinion (App. 38-44) may be summarized as follows:

1. In the enactment of ERISA, Congress expressly delegated broad rule making authority to the Department of Labor and the IRS to give definitions to such terms as "employer."
2. The powers given were exceptionally broad and they reasonably included the power to define interchange companies and reciprocal plans within the term "employer."
3. The definitional process of the terms occurred during the years 1978 and 1982 and the DOL expressly solicited and received input from Bell and others before finalizing the governing regulations.
4. Bell received a favorable determination letter from the IRS on the plan dated July 11, 1979 adding support and legitimacy to the reasonableness of AT&T's proposal and reliance on the rule making process.
5. There is no evidence suggesting any enforcement action by the EEOC, the Department of Labor or the Internal Revenue Service supporting petitioner's position, rather the lack of action supports Bell's position that they were entitled to have notice and an opportunity to comply before finality of the regulations.
6. Bell could readily have complied in 1979 but their position for broader inclusion of the interchange companies was reasonable in that the reciprocity of benefits program was inherently pro employee, it had been a part

of the system for decades and it was not a subterfuge to evade the ADEA exception.¹

What is *novel* about any of those six points?

Certiorari should not be granted because the court of appeals' application of the substantive law was proper.

II.

Caldwell Worked in a "Bona Fide Executive Capacity"

Both the district court and the court of appeals correctly determined that petitioner's job was unmistakably one of the few top level management jobs intended by Congress to be included in Section 631(c)(1). This court's attention is invited specifically to both lower court opinions (App. 1-15 and App. 76-77) for detailed application of the legislative history and published regulations to the supervisory and managerial responsibilities of Mr. Caldwell in his comptroller's job with a \$7.5 million budget and direct supervision of 441 employees. The job description in the record was approved by petitioner himself. On such undisputed facts the issue is one of statutory interpretation and, as such, summary judgment was proper. *State of Okla. ex rel. Dept. of Human Services v. Weinberger*, 741 F.2d 290, 291 (10th Cir. 1983) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986).

¹ Petitioner suggests that for a Bell employee to be eligible for interchange benefits (apparently among all 37 of the system's companies) a management arranged transfer is probably required. That suggestion is asserted without factual or documentary basis in the record nor was it argued below. A more detailed response is thought to be inappropriate.

Caldwell's arguments about evidentiary standards at pp. 46 and 47 of his Petition exhibit confusion about proper evidentiary standards for jury consideration.

Moreover, it is clear from the facts he chooses to discuss at pp. 47 *et seq.* that Caldwell once again urges that Bell's perception of his job within the corporate structure is relevant (the internal perception). The lower courts' held that Congress and the published regulations intended an objective, market place or external view of the job's responsibilities when testing the proper application of the exception to the job in dispute.

Because Caldwell worked for such a large company, even though he was not an officer and was on a third tier of reporting to the head of Bell, he, nonetheless, as one of nine department heads in one of the five states, was in the top .05 percent of management. His job was properly found to have been in the top level (not middle) of management. No facts urged in the petition were omitted below nor are they disputed.

Finally, the argument that because Mr. Barnes, Bell's CEO, was continued as Chairman and CEO after age 65 mandatory retirement in 1986 raises new factual allegations for the first time. These allegations are not part of the record before either the district court or the court of appeals. They are raised here for the first time and, therefore, should be ignored in considering the merits of the petition for a writ.

III.

Trial Court's Denials of Leave to Amend Complaint Were a Proper Exercise of Discretion

The discretion of the lower court should be left undisturbed absent a showing of abuse. No adequate

showing was made to the trial court nor the court of appeals. Petitioner's attempt to urge here, for the first time, that Bell's board of directors should have, but did not, review plan amendments in 1978 is, again, an attempt to urge facts not in the record and theories not advanced below.

Whether or not the board approval was appropriate depends on the reasons for changes in the pension plan. The plan itself states the board's approval is not also necessary where amendments are required because of changes in the law. The 1978 Benefits Committee minutes (App. 173) and the letter sent by its Chairman to Bell's President establish that the plan amendments in question were made necessary or desirable because of 1978 amendments by Congress to the ADEA. As stated by the Chairman of the Pension Committee in the letter to the President (App. 175-176) review by the Board was not required. Caldwell does not dispute that the plan amendments recommended for adoption by the Benefit Committee to the President of Bell were substantively required by changes in the law. Rather, he seizes on a single phrase in the Benefit Committee minutes and juxtaposes it with a statement in the letter to the President that might be in conflict. Caldwell's position was not detailed to the district court as a review of the relevant Appendix material will show.

Leave to amend was sought at the trial court level on Caldwell's general complaint of "improper procedure" (no specific mention was made of the lack of alleged necessary review by the board of directors). Petitioner also claimed below that the committee acted without a quorum in attendance when it met to determine Caldwell's retirement. Apparently, petitioner elected not to urge the lack of a quorum issue here.

The district court acted properly after reviewing briefs and the theories and explanations then furnished on the

"improper procedures" claim. Bell respectfully requests that it is appropriate and desirable that this court leave the matter undisturbed since no abuse of that court's discretion has been shown.

CONCLUSION

For the reasons urged, this Court should not issue a Writ of Certiorari on any of the questions presented.

Although the "nonforfeitability" of the pension benefits question presents an interesting and technical question involving the role of rule making and the time by which affected pension managers must conform their practices to changes in the law as clarified and interpreted in the rule making process, the resolution of the issue by 1982, both by the agencies and by Bell's plan, limits the importance of the question to an earlier time. The case has no precedential significance, there is no conflict in the law among the circuits, and it does not raise a matter of public importance.

Respectfully submitted,

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APPENDIX

- A. Affidavit of Therese F. Pick, Benefits Administrator for AT&T..... App. 1
- B. AT&T letter to U.S. Department of Labor dated March 5, 1979..... App. 8
- C. Qualification letter from IRS dated July 11, 1979App. 15
- D. Excerpts from Caldwell's Brief in Chief to the Court of Appeals.....App. 17
- E. Job description of Comptroller's job.....App. 20
- F. Summary of Proposed and Final Regulations on Permissible Suspension of Benefits.....App. 23



APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,)	
)	
Plaintiff,)	
)	
vs.	)	No. Civ.-81-114T
)	
SOUTHWESTERN BELL)	
TELEPHONE COMPANY,)	
)	
Defendant.)	

AFFIDAVIT OF THERESE F. PICK

STATE OF NEW JERSEY	:	
	:	ss:
COUNTY OF MORRIS	:	

THERESE F. PICK, being first duly sworn upon oath,
deposes and states as follows:

1. My name is Therese F. Pick. I am the Director - Benefit Administration and Personnel Practices for American Telephone and Telegraph Company (AT&T). I have been in such position since August, 1971.

2. In my current position I am responsible for the administration and interpretation of Bell System benefit plans and programs which are maintained on a common national basis. Such plans include the Bell System Pension Plan, the Bell System Management Pension Plan, the Bell System Savings Plan for Salaried Employees, the Bell System Savings and Security Plan, and the Bell System Employee Stock Ownership Plan. I also provide interpretive advice and assistance to benefit administrators from the various Bell System companies, including Southwestern Bell Telephone Company (Southwestern Bell),

App. 2

with respect to the administration and interpretation of the aforementioned benefit plans and programs and with respect to other benefit plans and programs which such companies separately maintain. Among such separately maintained plans and programs was the Southwestern Bell Plan for Employees' Pensions, Disability Benefits and Death Benefits (the former Southwestern Bell pension plan), which was merged into the Bell System Pension Plan and the Bell System Management Pension Plan as of October 1, 1980.

3. I am generally familiar with the operation and administration of all benefit programs throughout the Bell System. In performing my responsibilities, I am assisted by a staff of approximately 22 management and 4 non-management personnel, working under my direction and supervision.

4. AT&T established its Plan for Employee's Pensions, Disability Benefits and Death Benefits (the former AT&T pension plan) in 1913. Since that time, Southwestern Bell and other AT&T subsidiary and associated companies, which are commonly known as and comprise the Bell System, established and maintained plans similar in all material respects to that established and maintained by AT&T. All such plans were similar to one another in all material respects during the entire period of Carl Caldwell's employment by Southwestern Bell and until the date of their merger effective October 1, 1980.

5. The various Bell System companies, a list of which I have attached hereto and incorporate herein by reference, which established and maintained such pension plans entered into interchange of benefit obligation

App. 3

agreements as early as January, 1913. Such agreements by and among AT&T, Southwestern Bell and other Bell System companies were, and are, identical in all material respects. (All the companies participating in such agreements are commonly known as "interchange companies.") The interchange agreements provide for the recognition of service credit for all benefit related purposes, including the eligibility for and computation of a pension, by AT&T and all such other interchange companies.

6. The various pension plans maintained by the Bell System companies have provided and continue to provide for the suspension of pension benefits upon the re-employment of a retired employee by the company from which he or she retired or by any other company with which such company had an interchange agreement except for re-employment by Rochester Telephone Company (Rochester) since January 1, 1980 or by Cincinnati Bell Inc. (Cincinnati) or Southern New England Telephone Company (SNET) since January 1, 1982. Until October 1, 1980, when Southwestern Bell's and other Bell System pension plans were merged into two new national plans established by AT&T, the various Bell System pension plans were maintained by each Bell System company with full reciprocity with respect to the interchange of benefit obligations and the suspension of pension benefits upon the re-employment of a retiree. Accordingly, all Bell System employees receive the benefit of reciprocal service credit recognition by all Bell System interchange companies and, until January 1, 1980, also by Rochester.

7. The former Southwestern Bell pension plan, as well as all other interchange company pension plans

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except those of Cincinnati or SNET, were merged into the Bell System Pension Plan and the Bell System Management Plan as of October 1, 1980. As of such date, Mr. Carl Caldwell commenced to receive the pension benefit that he had previously received from the former Southwestern Bell pension plan from the Bell System Management Pension Plan. Such benefit was exactly the same in amount and all other respects immediately after the merger of the pension plans as it was immediately prior thereto and has remained the same until the date hereof except for an increase in Mr. Caldwell's monthly pension amount of \$259.01 effective April 1, 1981. I have attached a list of all those Bell System companies which are participating in the Bell System Management Pension Plan. All such companies are either wholly owned, directly or indirectly, by AT&T, or are more than 80 percent owned, directly or indirectly, by AT&T.

8. Effective October 1, 1980, Cincinnati and SNET also adopted pension plans similar in all material respects to the Bell System Pension Plan and the Bell System Management Pension Plan. From and including such date, such plans of Cincinnati and SNET, together with the Bell System Pension Plan and the Bell System Management Pension Plan, provided and continue to provide for the interchange of benefit obligations in the same manner that the interchange of benefit obligations agreements did with respect to each company's former pension plan.

9. The interchange of benefit obligations agreement between the Bell System interchange companies and Rochester was terminated effective December 31, 1979. Accordingly, on and after January 1, 1980, there was no

longer interchange of benefit obligations between and among Rochester, AT&T and the rest of the Bell System except with respect to service related to employment prior to such date. Additionally, effective on and after January 1, 1980, the pension benefits of any employee covered by any Bell System company pension plan have not been subjected to suspension for re-employment by Rochester.

10. The interchange agreements by and among Cincinnati, SNET, AT&T and the rest of the Bell System remain in effect through the date hereof. However, effective January 1, 1982 the Bell System Pension Plan and the Bell System Management Pension Plan were amended to provide that the pension benefit of a retiree under either such plan is not subject to suspension upon the re-employment of such a retiree by either Cincinnati or SNET after the individual's normal retirement age (age 65). These amendments were in response to and in accordance with final regulations issued by the United States Department of Labor concerning the suspension of pension benefits upon the re-employment of a retiree. Such final regulations became effective January 1, 1982.

11. Although pension benefits of Bell System retirees have not been subject to suspension for re-employment after age 65 by Rochester since January 1, 1980 and by Cincinnati or SNET since January 1, 1982, I have asked members of my staff to ascertain to what extent and how many pensions have ever been suspended for re-employment of a Bell System retiree by Cincinnati, SNET or Rochester. Such members of my staff have spoken with officials of those companies and have determined that no Bell System retiree's pension benefit

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has ever been suspended for re-employment by Cincinnati, SNET or Rochester.

12. The Bell System pension plans which existed prior to October 1, 1980, as well as the Bell System Pension Plan and the Bell System Management Pension Plan which became effective on October 1, 1980, are, and have been, recognized as "other than multi-employer" plans by the Internal Revenue Service (IRS) and the IRS has issued determinations of qualification under Section 401(a) of the Internal Revenue Code for such plans.

/s/ Therese F. Pick
Therese F. Pick

Sworn and subscribed to
before me this 19th day of
March, 1982.

/s/ Delpha M. Rosenkranz
DELPHA M. ROSENKRANZ
(NON-READABLE)

List of Interchange Companies

American Telephone and Telegraph Company
Bell Telephone Company of Pennsylvania
Bell Telephone Company of Nevada
Bell Telephone Laboratories, Incorporated
Chesapeake and Potomac Telephone Company
Chesapeake and Potomac Telephone Company
of Maryland
Chesapeake and Potomac Telephone Company
of Virginia
Chesapeake and Potomac Telephone Company
of West Virginia
Cincinnati Bell Incorporated
Diamond State Telephone Company
Empire City Subway Company (Limited)
Illinois Bell Telephone Company

App. 7

Indiana Bell Telephone Company, Incorporated
Malheur Home Telephone Company
Manufacturers' Junction Railway Company
Michigan Bell Telephone Company
Mountain States Telephone and Telegraph
Company
Nassau Recycle Corporation
New England Telephone and Telegraph
Company
New Jersey Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
Ohio Bell Telephone Company
195 Broadway Corporation
Pacific Northwest Bell Telephone Company
Pacific Telephone and Telegraph Company
*Rochester Telephone Company
South Central Bell Telephone Company
Southern Bell Telephone and Telegraph
Company
The Southern New England Telephone
Company
Southwestern Bell Telephone Company
Teletype Corporation
Western Electric Company, Incorporated
Wisconsin Telephone Company
AT&T International, Inc.
Advanced Mobile Phone Service, Inc.
Western Electric International, Incorporated

*Participation in Interchange Agreements terminated as
of December 31, 1979.

APPENDIX B

(SEAL) AT&T

Scott J. Macey
Attorney

American Telephone and
Telegraph Company
295 North Maple Avenue
Basking Ridge, N.J. 07920
Phone (201) 221-6567

March 5, 1979

Office of Regulatory Standards and Exceptions
Pension and Welfare Benefit Programs
U.S. Department of Labor
Room C-4526
Washington, D.C. 20216

Re: *Proposed Regulation Section 2530.203-3*

Dear Sir or Madam:

The instant correspondence is in response to proposed regulations of the Department of Labor (the "Department") published in the Federal Register of December 19, 1978 regarding the circumstances pursuant to which a pension plan may suspend the payment of benefits to a retiree. These comments are submitted on behalf of American Telephone and Telegraph Company (AT&T) and other associated and subsidiary companies in the Bell System.

Although AT&T takes a positive view of many of the provisions of the Department's proposed regulation and commends the Department for clarifying many issues regarding the application of ERISA Section 203(a)(3)(B) with respect to the suspension of pension payments to a retiree who is reemployed, we do feel that such proposed

regulation needs further clarification in several significant respects. As a preliminary matter, it should be noted that the Bell System generally considers retirement on a pension as a permanent separation from System employment. However, we also recognize that a return to full or part-time employment may be desired or necessary under some circumstances. Accordingly, Bell System pension plans currently contain provisions for the suspension of benefits upon reemployment of a retiree by any Bell System company which is signatory to a System wide agreement for the interchange of pension obligations (i.e., recognition of all Bell System service by each company for purposes of participation, vesting an accrual) among Bell System companies. Such suspension provisions currently provide that a reemployed retiree's benefit will be permanently suspended for the prorated portion of a month in which the individual is reemployed.

As we consider retirement on a pension as a permanent separation from employment, we generally feel that it is important that such permanency be preserved in the interest of the efficient operations of our business and the administration of our benefit plans. Accordingly, the proposed regulations regarding the suspension of benefits upon reemployment of a retiree are of great concern to us and we would hope that they would not have a significant impact on the perspective of the work force in general and on the tens of thousands of retirees and pension eligible employees in particular with respect to the individual retirement decision.

Under section 2530.203-3(b)(1), a plan may permanently suspend pension benefits because of reemployment of a retiree if such individual completes 40 or more

hours of service for an employer which maintains the plan, including employment by an employer which is a member of a control group of corporations, another member of which is paying the pension. In our opinion, such a rule is overly restrictive and does not take full cognizance of economic realities. The Bell System is comprised of a number of associated and subsidiary companies, most of which are members of a control group of corporations within the meaning of Section 1563 of the Internal Revenue Code. However, certain associated Bell System companies, such as Southern New England Telephone Company and Cincinnati Bell, are not members of such control group. Nonetheless, these latter companies and other Bell System companies commonly participate in an arrangement whereby service for one such company is recognized by any other such company for which an individual is employed for purposes of pension plan participation, vesting and benefit accrual under essentially identical plans maintained by each company. A literal application of the proposed Department rule would not allow for the suspension of pension payments upon the reemployment of a retiree who is receiving a pension payment from one Bell System "interchange" company and who is reemployed by another such company. This is because the proposed regulation appears to restrict the suspension to instances of reemployment by an employer who maintains the *same plan* as the employer making the pension payments and who is also a member of the control group. We suggest an alternative rule which would give effect to the practice of the Bell System and other national multiple corporation groups and

which would allow for the suspension of pension payments upon reemployment by any member of such group if either (1) the current employer is a member of a control group of which the employer making the pension payments is also a member, or (2) the current employer and the employer making the pension payments credit an employee for service with each other for all purposes of participation, vesting and accrual, as long as, in either (1) or (2) above, the current employer and the employer making the pension payments maintain the same or similar plans.

In addition to the above, the proposed rule of Section 203-3(b)(1) is unrealistic in that, according to footnote 5 of the Supplementary Information, it would require the continuance of pension payments if a reemployed retiree were to be disabled from work and receive disability benefits from a plan maintained by the current employer. Reemployed retirees in the Bell System are essentially treated the same as all other employees and are, accordingly, eligible for disability benefits from company maintained sickness and accident disability plans. Any rule which prohibits the suspension of pension benefits if a reemployed retiree were to receive disability benefits would require the duplication of benefit payments and would be unfair to and inequitable for all other employees and retirees. Accordingly, we suggest a rule which either allows for the continued suspension of pension payments when a reemployed retiree receives disability payments from a company maintained plan or, in the alternative, allows such reemployed retiree to elect between receiving disability payments or returning to

retiree status and recommencing to receive retirement benefits.

Although we do not find the proposed 40 hour rule particularly troublesome, we would like to suggest an alternative. We believe that intermittent reemployment by a retiree should be discouraged both for purposes of plan administration and the efficient and economic operation of our business. Accordingly, although it is not current Bell System practice, we suggest that pension payments be allowed to be suspended for a full month for each month in which a retiree is reemployed for any amount of time. We believe that this would best take cognizance of economic realities and the purpose of retirement plans, and also discourage those retirees from pursuing reemployment who have no serious intent of remaining reemployed for any length of time. Any other rule may generate serious administrative and expense problems for employers and plan administrators.

With respect to the notification rules of proposed Section 203-3(b)(4), we feel that they are of particular significance for multi-employer plan participants and commend the Department for its proposal. However, we also feel that such notification requirements would be of little meaning to participants in single employer plans and suggest that such requirements not be applied to such plans or, in the alternative, more limited rules be applied to such plans. In any case, it is also suggested that notification to retirees of suspension rules be allowed to be accomplished either through the facility of summary plan descriptions or by providing a separate written explanation of the rules upon the application for

reemployment of any retiree. This would avoid the necessity of amending current summary plan descriptions and would satisfy the need for information concerning the suspension rule for those individuals who would be most concerned.

We also suggest that proposed Section 203-3(c)(1) be clarified to make it clear that any service by an employee who remains in active employment (i.e., has never retired) and (1) who is eligible for immediate payment of a pension upon termination from service, and (2) whose benefit has not yet commenced payment pursuant to ERISA Section 206(a), is not included within the definition of Section 203(a)(3)(B) service.

Finally, we suggest that the proposed regulations be clarified to specify that benefit accruals for prior service need not be adjusted for plan changes or wage increases subsequent to the initial commencement of a pension unless such changes would be applicable to retirees in general. We believe such rule to be consistent with existing IRS Regulations Section 1.411(c)-1(f) as well as the recently amended Age Discrimination in Employment Act and the Department's proposed Interpretive Bulletin thereunder. We also believe that any other rule would put an unfair and costly premium on reemployment to the detriment of all other employees and retirees. Finally, in suggesting such a clarification we are well aware of the minimum standard rules under ERISA regarding the recognition or bridging of prior service for current participation, vesting and accrual purposes and that such rules would apply in the case of reemployed retirees. Of course, we recognize that all plan changes and wage

increases during the period of reemployment, if otherwise applicable, would apply to pension accruals for such reemployment period.

We appreciate this opportunity to comment upon the proposed regulations and hope that these comments have been of some assistance to you in preparing final regulations on the subject of suspension of benefit payments. We would be happy to meet with you personally or respond in writing should you wish to discuss this matter further.

Very truly yours,

Scott J. Macey
Scott J. Macey
Attorney

APPENDIX C

P.O. BOX 3200 CHURCH
STREET STA.
NEW YORK NY 10008

CASE NO 13911502EP
CONTROL DATE 04-12-79
FORM NO 5300
EMP ID NO 43-0529710
PLAN NO 001
FILE NO 130004588
DATE OF THIS LETTER
JUL 11 1979

PLAN: PLAN FOR
EMPLOYEES PENSIONS
NAME DISABILITY BENE-
FITS AND DEATH
BENEFITS

SOUTHWESTERN BELL
TELEPHONE COMPANY
1010 PINE STREET
ST LOUIS, MO 63101

Dear Applicant:

Based on the information supplied, we have made a favorable determination on your application identified above. Please keep this letter in your permanent records.

Continued qualification of the plan will depend on its effect in operation under its present form. (See section 1.401-1(b)(3) of the Income Tax Regulations.) The status of the plan in operation will be reviewed periodically.

The enclosed Publication 794 describes some events that could occur after you receive this letter that would automatically nullify it without specific notice from us. The publication also explains how operation of the plan may affect a favorable determination letter, and contains information about filing requirements.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

App. 16

Please see Form 5616, enclosed, which is an integral part of this determination letter.

Sincerely yours,

Charles H. Breman
DISTRICT DIRECTOR

Enclosures:
Publication 794
Form 5616

APPENDIX D

EXCERPT'S FROM CALDWELL'S BRIEF IN
CHIEF TO THE COURT OF APPEALS

D. *THE LOWER COURT ERRED IN DENYING CALD-
WELL LEAVE TO AMEND HIS COMPLAINT*

In the Court below, Caldwell sought to amend his Complaint in two particulars, based on information obtained during discovery. First, Caldwell sought to allege that the January 1, 1979, amendment to SWBT's pension plan was not properly adopted, and therefore SWBT could not, at any time, utilize the bona fide executive exemption to the ADEA, found at Title 29 U.S.C. § 631(c)(1), or freeze benefits at age 65 (29 C.F.R. § 860.120). Second, Caldwell attempted to amend his Complaint to allege that the Benefit Committee did not have a quorum on November 13, 1979, the date upon which it decided to retire Caldwell. These issues were initially raised in Caldwell's Amendment to Complaint and Request of Plaintiff to File Additional Amendments, filed on January 26, 1982. The lower court initially ruled that Caldwell's Motion had been rendered moot. See, Memorandum Opinion and Order, filed August 20, 1982. Caldwell renewed his Motion in Plaintiff's Motion to File Additional Amendments, filed on May 3, 1984, document no. 5. This Motion was denied by the court in its Memorandum Opinion and Order, filed May 22, 1986, document no. 49.

Rule 15(a), F.R.Civ.P. reads as follows:

"Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

In reviewing the lower court's decision not to allow Caldwell to amend his complaint the Court should reverse if it finds that the court below abused its discretion. *United States Fidelity and Guaranty Company v. United States for the Use and Benefit of Contractor's Electric Supply, Inc.*, 389 F.2d 697 (10th Cir. 1968). Caldwell respectfully submits that the lower court abused its discretion when it denied him leave to amend his Complaint, and therefore, this Court should reverse the Order.

The basis, or any reasons for, the lower court's refusal to allow Caldwell to make the amendments was not set out in the opinion, and it is not apparent. Assuming that Caldwell could adequately prove that the January 1, 1979 amendments to the SWBT Plan designed to incorporate provisions deemed advisable as a result of the 1978 amendments to the ADEA, were *not* adopted in accordance with the formal requirements of that Plan, then there were no valid amendments and thus no *basis* on which to retire him. There is no valid reason why Caldwell should not be permitted to prove the allegation, which would have been included in the original complaint had the facts been known at that time. However, those facts were only subsequently discovered by Caldwell during discovery procedures. The ADEA requires that such valid provisions be contained in a pension plan. 29 U.S.C. § 623(f)(2).

The by laws of the benefit committee (likewise obtained by Caldwell in discovery procedures) provide, in Article III, that there be a quorum present before any effective action can be taken. See Addendum, Item 6. Caldwell's proposed amendment alleged that such a legally authorized quorum was not present when the

decision to retire him was made. Assuming he could adequately prove that allegation, then the retirement was illegal and he would be entitled to continued employment. There is no apparent reason why he should have been denied the right to prove the allegation.

Caldwell respectfully submits that the lower court abused its discretion when it refused to grant him leave to amend his Complaint. Therefore, this Court should reverse the Order of the lower court.

* * *

APPENDIX E

EXCERPTS FROM POSITION DESCRIPTION OF
CALDWELL'S POSITION WITH BELL

Position No. 9319

POSITION DESCRIPTION

Job Title General Accounting Manager
State Oklahoma Dept. Comptrollers

* * *

Address 707 N. Robinson, Room 400,
Oklahoma City, Oklahoma

Supervisor's Title Director - Accounting Operations

Analysis By ___ Date ~~October 29, 1976~~

Concurrence: Incumbent /s/ Carl Caldwell

Supervisor /s/ K.N. Bensler

11-4-76

Job Summary

This position in Oklahoma carries statewide responsibility for all aspects of comptroller operations. This includes property and cost, payroll, revenue and data processing operations; including real time operations for CALL/OS (time share system for the Company and SORD, PLAN, TRPS, and DIRECT for both Arkansas and Oklahoma. This job is also responsible for supporting and participating in rate cases and other regulatory matters; timely and correct issuance of financial, tax, measurement and performance reports.

Job Duties and Responsibilities

10% A. Directs, guides and administers all payroll and property and cost activities in the Area.

* * *

10% B. Administers and directs revenue accounting operations to assure proper billing of customers and accountability of revenues collected.

* * *

20% C. Administers data processing services for the Oklahoma Area and certain applications for the Arkansas Area.

* * *

20% D. Directs, guides and advises on all matters related to personnel administration.

* * *

25% E. Administers and directs employees and participate in the following activities related to Area and Company revenues and earnings:

* * *

10% F. Directs and guides activities to assure that procedures are efficient and that information and data furnished to the customers and the operating departments are of high quality.

* * *

5% G. Participate in the following activities that are interdepartmental in nature and impacts all employees in the Area:

* * *

Scope and Nature of Supervision

A. Job Scope

1. The duties of this job are broadly assigned and the incumbent operates within the policies established at the officer level within the Company. The incumbent has very little direct guidance in the operations of his organization. Exerts wide discretion in administering the job and determining where

personnel should be utilized to achieve the most effective and productive results.

2. Actions are largely guided by practices, policies, experience and procedures. The incumbent must also be responsive and effective in dealing with needs of the Operating Departments. This position requires a thorough knowledge of accounting principles and a good working knowledge of the Operating Departments. A continuing challenge includes developing plans for new projects, such as, DIRECT, LMOS, LINIS, BISCUS/FACS, etc., and their effect on expense views, personnel requirements and office performance results.
3. This position reports to the Director - Accounting Operations. The incumbent works closely with the area Vice President and General Manager in projecting revenues and expenses, preparation for rate hearings and in formulating and implementing area policies.
4. Results are largely measured by various indexes, i.e., CAMP, CARE, billing service, payroll quality, expense per telephone, etc.

B. Job Sizing

Customer Accounts	866,000
Annual Expense Budget	\$7.5 million
Subordinates	
Management	87
Non-Management	205
Total	<u>292</u>

APPENDIX F

**PROPOSED AND FINAL REGULATIONS ON
PERMISSIBLE SUSPENSION OF BENEFITS**

- A. Internal Revenue Service Final and Temporary Regulations Governing Pension, Profit Sharing and other Benefit Plans as of August 22, 1977, § 1.411(a)-4(2).
 - B. Proposed Amendment to Interpretive Bulletin and Regulations and Notice of Hearing. Issued by Department of Labor, Wage & Hour Division. (43 Fed. Reg. 58148). Dated December 12, 1978.
 - C. EEOC Age Discrimination Final Interpretations. (44 Fed. Reg. 86781). Dated November 21, 1979.
 - D. Proposed Department of Labor regulations on suspension of benefits to be codified at 29 C.F.R. § 2530.203-3 dated December 19, 1978 (43 F.R. 59098).
 - E. Department of Labor Notice of Final Regulations filed January 19, 1981, for 29 C.F.R. § 2530.203-3.
 - F. Department of Labor Notice of Final Regulations (amended) filed December 4, 1981, for same, effective January 1, 1982. (46 Fed.Reg. 59243)
 - G. Notice 82-83 of IRS, 1982-2 Cum. Bull. 752 dated December 3, 1982, providing that IRS qualified plans must be amended by the end of the first plan year beginning after 1983 with amendment to be effective January 1, 1982.
-

OCT 25 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-380

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CARL P. CALDWELL,
Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT
OF PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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(405)235-4074

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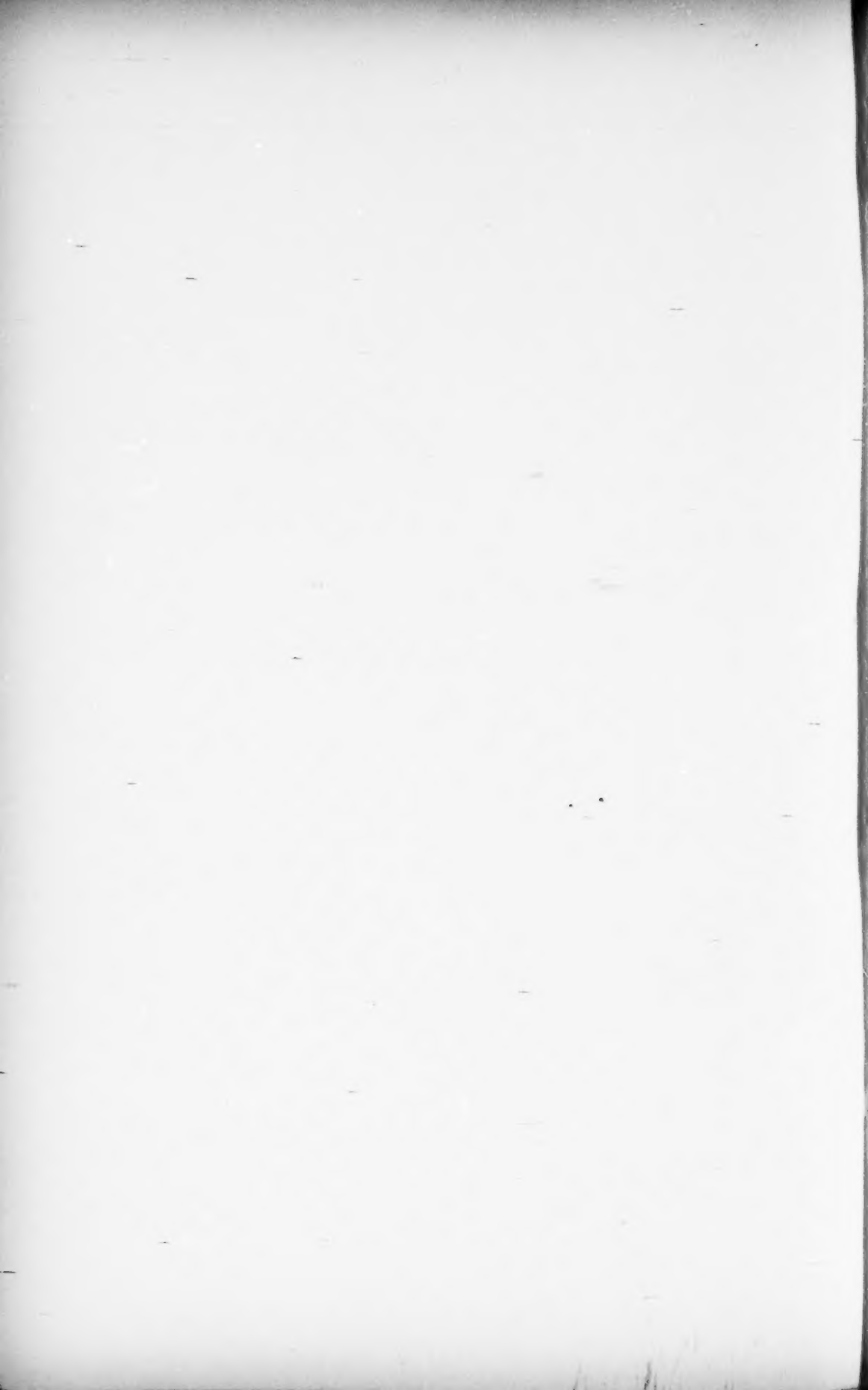


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I. FAILURE TO PERMIT AN AMENDED COMPLAINT

Bell inaccurately states in its Response that Caldwell never raised below the issue that Bell's board of directors failed to approve the bona fide executive exception by amendment to Bell's pension plan.¹ Plaintiff filed its first leave to amend his Complaint on January 26, 1982. [Ap.158].² In the brief attached thereto, Caldwell stated:

"It is plaintiff's position that the Committee, in this instance, specifically decided that the amendment necessitated the approval of the Board of Directors and therefore recommended such action. When such approval was not obtained, the amendment thereby became ineffective and furnished no basis for a reliance by defendant on the bona fide executive or high policy making position exception to the normal age 70 protection of the ADEA." [S.Ap.1,7].

1 pp.4&13 of Respondent's Brief in Opposition to Petition for Writ of Cert. ("Bell's Resp.").

2 Reference to Caldwell's original appendix is, as in Caldwell's Petition for Writ of Certiorari, "Ap.___". Reference to the supplemental appendix attached to this reply is: "S.Ap.___", furnished solely for rebutting the above mentioned misrepresentation.

On February 12, 1982, Bell even argued in the District Court that such a review by Bell's Board of Directors was not necessitated [S.Ap.9&10], and in another document filed the same day, Bell stated:

"Plaintiff's brief incorrectly states that the Committee 'felt that the amendment concerning the bona fide executive or high policy making required the approval of the Board of Directors'". [S.Ap.13].

On February 24, 1982, Caldwell filed a reply directed to this very issue. [S.Ap. 15-23].

Caldwell requested leave to amend again on May 3, 1984 [Ap.163], and urged that Bell had failed to adopt a valid amendment to its pension plan that purportedly enacted the bona fide executive exception. [S.Ap.24-26]. In that document with the accompanying proposed order and proposed amended Complaint, Caldwell again urged that Bell had failed to obtain Board approval. [S.Ap.26-29].

On May 30, 1984, Bell again responded
and succinctly stated:

"Plaintiff's requested first amendment * * * alleges that the defendant's decision making process was defective in that * * * the Committee's action at a meeting held on December 20, 1978, adopting the ADEA amendment to the Plan required approval of the Board of Directors." S.Ap.30-32].

At the Circuit Court level, Caldwell specifically urged, on pages 10 and 11 of its reply brief, that the District Court committed reversible error for not permitting Caldwell to amend his Complaint so as to allege and prove that Bell invalidly adopted a bona fide executive exception as an amendment to its pension plan.

"Caldwell's request to amend his complaint is addressed to the most fundamental element that SWBT³ is required to meet, i.e., 'were the terms of the SWBT plan properly amended so that the exceptions could be used under the provisions of 29 U.S.C. §623(f)(2) of the ADEA'? Simply put, the issue is whether

3 Bell was frequently referenced as "SWBT" in both lower courts.

SWBT's - Board of Directors was required to approve the aforementioned changes in the plan." [S.Ap.33-35].

The issue rose again in Caldwell's Petition for Rehearing before the Tenth Circuit. [S.Ap.36-39].

The attached supplemental appendix was not included in the original appendix because it was incomprehensible to Caldwell that Bell would claim such an issue had not been argued numerous times in both the Trial and Appellate Courts. Caldwell is shocked at such a misrepresentation by Bell. Caldwell is not claiming Bell purposely misstated the record to this Honorable Court; however, Bell's ineptness in properly reviewing the records below casts doubt on other unsupported assertions contained in Bell's Response.

Bell urges on page 13 of its Response that Board approval for the amendments to the pension plan were unnecessary, as

they were "required by changes in the law". Caldwell disagrees with such an assertion. Since the sole statutorily required change made in the Plan was the removal of the provision of mandatory retirement for all employees at age 65, Bell's assertion that the Plan amendments "were substantively required by changes in the law" is inaccurate.

In short, Bell chooses to ignore that it is the "opinion of the committee", as set forth in the Plan, which governs when changes in the Plan are required or made desirable by federal or state statutes, and as a result thereof when the Board of Directors' approval for the changes is not required. Changes made in the Plan for the mandatory retirement of bona fide executives at age 65, and for all other employees at age 70, and for the freezing of pension benefits for employees who worked after age 65, were changes that were permitted but not required by law.

Bell's attempt to change permissive provisions to "those required by changes in the law", is another misstatement of facts in the case at bar.

II. JURY TRIAL - BONA FIDE EXECUTIVE

At the top of page 12 of Bell's response, Bell claims Caldwell's evidentiary standard argument is "confusing", but fails to elucidate. The argument is simple and concise. Under 29 C.F.R. §1625.12(b), Bell's burden of proof must meet the clear and convincing evidence standard. That standard must be considered by the trial court in ruling on a motion for summary judgment. Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-2514, 91 L.Ed.2d 202 (1986). Bell failed to meet such a standard. Furthermore, even as to undisputed facts, the trial court is prohibited from drawing ultimate inferences therefrom where, as here, such inferences are divergent.

Anderson vs. Liberty Lobby, Inc., id.

The District Court improperly drew an inference that Caldwell was a bona fide executive from the facts submitted by Bell. Such was an usurpation of a jury's proper function.

Irrespective of Bell's bold assertion that "Congress and the published regulations intended an objective, market place or external view of" Caldwell's responsibilities when determining whether Caldwell was, or was not, a bona fide executive, it is an inescapable conclusion that one of the many relevant considerations is Bell's own historical perception of Caldwell's actual status.

The 1978 revision of the ADEA, inter alia, created a new classification of exempt employees, so-called bona fide executives, that permitted employers to utilize the exemption, if they so chose, so as to retire only a limited number of employees at age 65 rather than at age

70. 29 U.S.C. §628 initially authorized the DOL to issue such rules and regulations, as necessary, to carry out the provisions of the ADEA. Subsequently, that function was transferred to the EEOC. Such an authorization was implemented in 29 C.F.R. §1625.12(d) on November 12, 1979. Though, as noted in the regulation, the definitions and examples therein are based solely on the Conference Committee report, the employees subject to the exception described in the Committee report as "only certain high level executives" became, in the regulation, "a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business."

Since the bona fide executive exception applies to all covered employers, some with as few as 20 employees to employers as large as Bell

with almost 100,000 employees, the terms "significant number of employees", and "large volume of business" must be interpreted and evaluated relative to the size of the employer and not in a vacuum or in absolute terms. Furthermore, the extent to which an employee exercises "substantial executive authority" is dependant upon an evaluation of the extent to which internal policies and practices place limits on that authority and to the extent higher level employees may overrule that authority. A so-called "objective, marketplace or external" valuation does not, and obviously did not take these factors into consideration.

At a jury trial, a jury would be permitted to interpret and evaluate the evidence comparing such things as: (1) the number of employees subordinate to Caldwell (alleged to be 441) with the fact that there was a total of almost 100,000 employees of Bell, and (2)

Caldwell's budget (alleged to be \$7,500,000) with Bell's total budget (an alleged \$3,338,400,000 for 1979). It is those types of considerations and - relationships that a jury should have considered. Furthermore, a jury would consider Bell's control and amount of authority over Caldwell and the restrictions of Caldwell's authority.

In summation, not only was it improper to deny a jury an evaluation of Bell's historical perception of Caldwell as a bona fide executive, but it was likewise error to deny the jury the right to evaluate Bell's subsequent and belated labelling of Caldwell as an executive and as such, to consider such issues as motive, intent, Bell management's state of mind and credibility. Anderson v. Liberty Lobby, Inc., Id.

III. FORFEITABLE PENSION BENEFITS

Though Bell argues, on the one hand, that its pension benefits were

nonforfeitable, it irreconcilably admits, near the end of page 7 of its Response, that its Plan contained a "slightly more expansive definition" of "permitted suspensions" — than those statutorily allowed. However, faced with the inescapable conclusion that its pension plan forfeiture of benefits provision was illegal, Bell attempts to make light of it by proclaiming "Caldwell has not contended" that such an illegal provision "operates to discriminate against" him. To the contrary, that is EXACTLY what Caldwell does contend and has contended from day one in this lawsuit. Caldwell most certainly "claims" a "substantive violation of ADEA by operation of the pension benefits suspensions."

Although the Bell provisions for the suspension of benefits had been in effect since 1913, well before the enactment of the ADEA in 1967, the provision in Bell's Plan became illegal after the enactment

of ERISA in 1974, and the continuance of such an illegal provision in a plan certainly becomes a subterfuge if it discriminates in a manner forbidden by the substantive provisions of the ADEA. The suspension of benefit provision resulted in far reaching limitations for Bell retirees in seeking post-retirement employment, and this is certainly contrary to the substantive requirement of 29 U.S.C. §623(a)(2) that "it shall be unlawful for an employer * * * (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

The bona fide executive exception to the ADEA required that the Bell plan benefits be nonforfeitable and when Bell attempted to amend its plan in 1978 to

adopt the bona fide executive exception, the Bell plan had not yet been amended to bring it into compliance with the ERISA standards. This "post-Act" amendment in Bell's pension plan deprived retirees of further employment to which they were entitled, and this was therefore a substantive violation of the ADEA and a subterfuge to evade the purposes of the ADEA. Public Employees Retirement System of Ohio vs. Betts, 109 S.Ct. 2854, 2862 and 2865-2866 (1989).

Bell is again inaccurate at the top of page 9 of its Response wherein it states that Congress directed the DOL to define "employer". Code and ERISA state the DOL shall issue "such regulations as may be necessary to carry out the provisions of this subparagraph, including regulations with respect to the meaning of the term 'employed'". 26 U.S.C. §411(a)(3)(B) & 29 U.S.C. §1053(a)(3)(B). No where did Congress direct any agency to deviate

from the statutory definitions of "employer" set forth in both the ADEA [29 U.S.C. §630(b)] and ERISA [29 U.S.C. §1002(5)], or the definition of "employee" set forth in the ADEA [29 U.S.C. §630(f)] and in ERISA [29 U.S.C. §1002(6)]. Any argument to the contrary, as advanced by Bell and the Circuit Court, is certainly "novel". Certainly Congress did not give "exceptionally broad powers" to the DOL to interpret the meaning of the word "employer". This authorization has been taken out of context by Bell and expanded to conclude that reliance cannot be placed on the definition of "nonforfeitable" in 29 U.S.C. §1002(19), or the definition of "the employer who maintains the Plan" in 26 U.S.C. §§411(a)(3)(B) and 414(b), or the definition of a "controlled group of corporations" in 26 U.S.C. §1563.

Other examples of the Circuit Court's "novel" theories, and not heretofore

noted in either this reply brief or the initial Petition, concerns such theories (or rationalizations) supporting Bell's illegal plan as: (1) it would have been simple for Bell to amend its plan if the necessity to do so was clear [CA.Op.p.24; Ap.44]; (2) Caldwell failed to establish that Bell stood to gain any advantage from relying on an interchange of benefits approach, rather than a controlled group approach [CA.Op.p.25;Ap.45], or that other employers were similarly situated [CA.Op.p.23;Ap.42], and that regulatory agencies had undertaken enforcement concerning same [CA.Op.p.24;Ap.43]; and (3) Bell's self-serving affidavit that "no AT&T employee had ever had retirement benefits suspended because of reemployment with one of the three minority owned companies in the AT&T System". [CA.Op.p.24-25; Ap.44-45].

In approaching these "novel" theories

in reverse order, the immediately afore-said affidavit itself evidences the fact that retirees are limited in their employment opportunities because they do not seek employment with any "interchange company" where their benefits would be forfeited by virtue of doing so. Furthermore, Caldwell is unaware of any law that requires him to establish that either Bell "stood to gain an advantage", or that enforcement action had been initiated against other employers similarly situated, in order to prevail on his age discrimination case against Bell. In fact, Caldwell can think of no more irrelevant evidence than whether a federal agency did or did not seek enforcement action against Bell or any other "similarly situated" employer. Neither side presented such evidence below; nor did they attempt to do so.

Likewise, Caldwell is unaware of a rule of law that would require an emplo-

yer, such as Bell, to comply with statutory ERISA, Code and ADEA requirements only if that employer feels it is necessary to do so. Certainly, it is illegal for an employer to unilaterally determine that its "interchange" agreement system is "better" than the Congressionally mandated "controlled group" of companies system, and then blatantly refuse to comply with the statutory directives. Furthermore, the statement in the Appellate Court Opinion that Bell could have readily complied in 1979 with the statutory directives, certainly is not an excuse or justification for permitting Bell not to comply, and, at most, is a disingenuous argument supporting an absolution of Bell. These "theories", thrown into the Appellate Court Opinion as deceptive pillars supporting its decision and unaccompanied by any supporting authority, are indeed "novel".

Lastly, it is noted that Bell failed

to respond to the argument urged on page 32 of Caldwell's Petition for Writ of Certiorari. Therein Caldwell noted that if indeed Bell and the Court of Appeals are correct in their conclusion that the law was "unclear" and "in a state of flux", then Bell was unable to comply with the mandate of 29 C.F.R. §2530.210 stating that every element of the bona fide executive exception must be shown by Bell to have been clearly and unmistakably met. Apparently Bell has abandoned any objection to such an analysis.

CONCLUSION

Caldwell respectfully submits that he has established in his Petition, the prerequisites for acceptance of his Petition under Rule 17.1 of the Supreme Court Rules, i.e., the Tenth Circuit decided certain questions in a way in conflict with applicable decisions of this Court. Respondent replies there are

no "novel or important principles of law and no elements of great public interest" [Bell's Resp. p. 2] or of "public importance" [Bell's Resp. p. 14]. The principles of law are adequately described in the Petition and stand on their own. The importance of these are almost self-evident.

Despite Respondent's statement to the contrary, the following recurring issues are before this Court:

(1) Do statutory requirements not have to be met because an agency could issue regulations overriding those requirements, as so held by the 10th Circuit?

(2) Is a statutory permissive exception to the ADEA available, if arguably, the permissive exception is unclear, as so held by the 10th Circuit?

(3) Does the statutory definition of nonforfeitable pension benefits require the actual forfeiture of benefits by a retiree to prove that the benefits are

not nonforfeitable, as so held by the 10th Circuit?

(4) Is the definition of a bona fide executive under the ADEA a matter subject to statutory interpretation rather than a determination by a jury, as so held by the 10th Circuit?

(5) Can leave to file an amended Complaint be denied when facts supporting same are not revealed prior to discovery, as so held by the 10th Circuit?

Respectfully submitted,

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CERTIFICATE OF SERVICE

Joseph A. Claro, a member of the Bar of this Court hereby certifies that on the 24th day of October, 1989, three copies of the above and foregoing instrument with attached appendix were deposited in a United States mail box, with first-class postage prepaid, and addressed to counsel of record for respondent, at said counsel's post office address as follows:

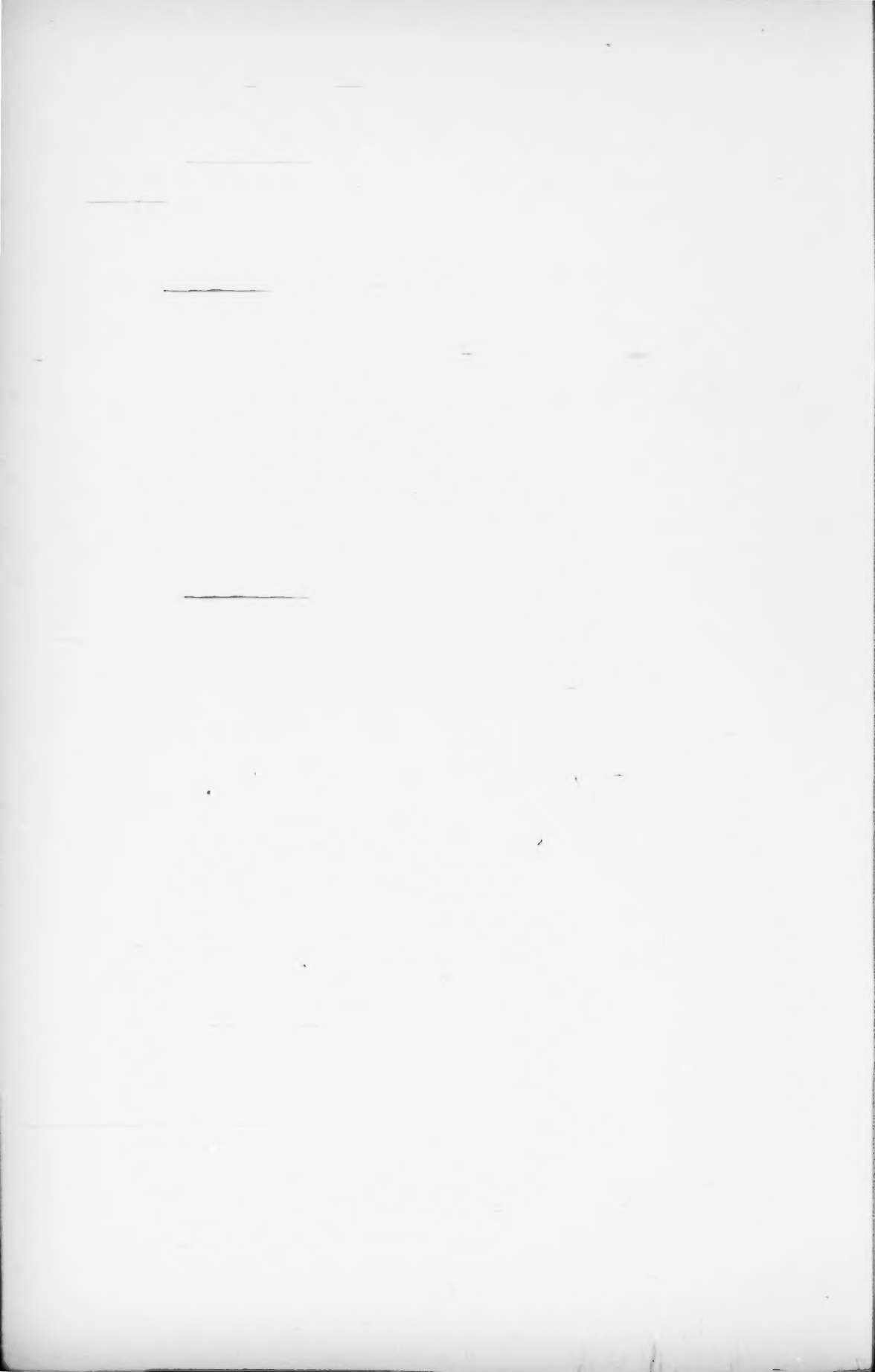
Mona S. Lambird, Esq.
Andrews, Davis, Legg,
Bixler, Milstein and Murrah
500 West Main
Oklahoma City, OK 73102

Respondent is the only party required to be served herewith.

Joseph A. Claro



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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CARL P. CALDWELL,)	
Plaintiff,)	
)	
vs.	)	No. CIV-81-114T
)	
SOUTHWESTERN BELL	)	[Attached to
TELEPHONE COMPANY,	)	Caldwell's Request
Defendant.	)	to file Amendment
	)	to his Complaint.
	)	Ap. p. 158-161]

BRIEF

This brief is submitted in support of the accompanying motion for permission to file an additional amendment to the Complaint.

The 1978 amendment to the ADEA, after raising the protected age group from 65 to 70, provides for an optional exception to employers in the following language:

"Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who *** is employed in a bona fide executive or a high policy making position, if ***".

By its own language, the use of the exception is optional to the employer. The Act certainly does not direct the employer to retire all executives or policy making personnel who have reached age 65. This construction is confirmed by EEOC's final interpretations for the Age Discrimination in Employment Act Exemptions for Bona Fide Executives or High Policy Making Employees. The interpretations are codified as 29 CFR 1625 and were issued at 44 F.R. 66971, effective November 21, 1979. Section 1625.12(c) contains this language:

"An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status."

The option chosen by defendant was to forcefully retire plaintiff at age 65. On January 12, 1982, the defendant, pursuant to plaintiff's request, produced

a copy of its "Plan for Employees' Pensions, Disability Benefits and Death Benefits" in effect on the date of plaintiff's retirement. With reference to amendments to the Plan, it provided:

"SECTION 10. CHANGES IN PLAN.

The Committee, with the consent of the President, and subject to the approval of the Board of Directors (or without such approval in the case of changes which, in the opinion of the Committee, are dictated by requirements of federal or state statutes applicable to the Company or authorized or made desirable by such statutes) may from time to time make changes in the Plan set forth in these Regulations, and the Company may terminate said Plan, but such changes or terminations shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder." (Emphasis supplied.)

Also produced by the defendant in response to a previous request by plaintiff, were the Minutes of "A Special Meeting of the General Employees' Benefit Committee" held on Wednesday, December 20, 1978 in St. Louis, Missouri. A copy

of the document is attached. It is significant that in the Resolution passed by the Committee, and despite the contents of the letter sent by the Chairman to the President (a copy of which is also attached), the Committee itself requested that the President "submit the changes to the Board of Directors for consideration". At that time, Southwestern Bell Telephone Company was the sole proprietor of its benefit plan (see Admission No. 2 filed November 2, 1981) and its own Committee which administered the Plan obviously felt that the amendment concerning the bona fide executive or high policy making position required the approval of the Board of Directors. Despite such recommendation, no such approval was obtained. Instead, the President's approval was simply endorsed at the bottom of the letter written by the Chairman forwarding the resolution. Likewise in effect on the date of

plaintiff's forced retirement was the Employee Retirement Income Security Act of 1974, 29 U.S.C., §§ 1001 to 1381. 29 U.S.C., § 1102, after providing that each employee benefit plan shall be established and maintained pursuant to a written instrument and that the Plan will be managed by named fiduciaries, provides in part:

"(b) Every Employee Benefit Plan shall--

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the Plan."

Section 1104, (subject to certain immaterial exceptions) relating to "fiduciary duties" then provides, in part:

"Sec. 1104(a)(1) * * * a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

* * *

(D) in accordance with the documents and instruments governing the plan * * *."

Section 1109(a) provides, in part:

"Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter * * * shall be subject to such other equitable or remedial relief as the court may deem appropriate * * *."

In this instance the defendant itself is a named "fiduciary" in the Plan under Section 3.6 thereof and is represented by its President, who, when he approved the adoption of the Resolution, presumably knew that the Committee itself had recommended its submission to the Board of Directors. Plaintiff recognizes that this case does not involve any personal liability of a fiduciary as contemplated by Section 1109(a) above quoted. It is quoted only to point out that the applicable law not only specifies the duties of the fiduciaries but also imposes sanctions for not following the provisions of

the Plan. It follows that such a failure should logically result in the Court declaring the unauthorized act to be a nullity.

It is plaintiff's position that the Committee, in this instance, specifically decided that the amendment necessitated the approval of the Board of Directors and therefore recommended such action. When such approval was not obtained, the amendment thereby became ineffective and furnished no basis for a reliance by defendant on the bona fide executive or high policy making position exception to the normal age 70 protection of the ADEA. In paragraph 16 (Second Affirmative Defense) of its Answer, the defendant has stated: "The plaintiff's job position with the defendant for two years prior to November 30, 1979 was a bona fide executive or a high policy making position of the type described in Section 12(c)(1) of the Age Discrimination in Employment Act

and further, plaintiff was entitled to an immediate non-forfeitable annual retirement benefit in excess of \$27,000.00 from a pension plan of the defendant. Defendant acted lawfully and consistently within the intent of Congress in retiring the plaintiff at age 65". If defendant had not effectively adopted its option to retire plaintiff based on said exception to the ADEA then it had no such option and was bound by the other provisions of the Act banning forced retirement prior to age 70.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CARL P. CALDWELL,)	
Plaintiff,)	
)	
vs.	)	No. CIV-81-114T
)	
SOUTHWESTERN BELL	)	[Filed Feb. 12, 1982
TELEPHONE COMPANY,	)	Herbert T. Hope
Defendant.	)	Clerk, U.S. Dist.
	)	Court]

DEFENDANT'S RESPONSE TO REQUEST
BY PLAINTIFF TO FILE ADDITIONAL
AMENDMENT TO COMPLAINT

Comes now defendant, Southwestern Bell Telephone Company, and responds as follows to plaintiff's request to amend his Complaint:

1. Plaintiff's requested amendments are contrary to the facts filed with this Court, will serve only to obfuscate the important issue(s) in this cause and will

not serve justice as required by Rule 15(a) of the Federal Rules of Procedure.

2. Plaintiff requests leave to amend by adding a paragraph 12(a) to his Complaint alleging that defendant improperly amended its Plan to permit retirement of bona fide executives. This allegation is wholly contrary to the facts discovered in this proceeding, in that (1) defendant's Plan authorized defendant's Benefit Committee, with the consent of the President -- and without Board of Director approval --, to approve changes authorized or made desirable by law;

* * *

The facts produced in this cause are that (1) the recommendation of defendant to the Committee expressly states that no Board approval is required; (2) AT&T

expressly recommends no Board approval;
(3) the Committee's RESOLUTION, the only official action of the Committee, does not require -- or even suggest -- Board action; (4) the letter approved by the Committee and attached to its minutes expressly states no Board approval is required; (5) the letter actually sent to the President states no Board approval is required; (6) the President approved the ADEA changes without submitting the amendment to the Board;

* * *

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ATTORNEYS FOR DEFENDANT,
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COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CARL P. CALDWELL,)
Plaintiff,)
vs.) No. CIV-81-114T
SOUTHWESTERN BELL) [Filed Feb. 12, 1982
TELEPHONE COMPANY,) Herbert T. Hope
Defendant.) Clerk, U.S. Dist.
Court]

MEMORANDUM SUPPORTING DEFENDANT'S
RESPONSE TO PLAINTIFF'S REQUEST
TO AMEND

PROPOSITION I: DEFENDANT'S AMENDMENT OF
ITS "PLAN FOR EMPLOYEES'
PENSIONS, DISABILITY
BENEFITS AND DEATH
BENEFITS" (PLAN) TO
ENCOMPASS THE BONA FIDE
EXECUTIVE PROVISION OF
SECTION 12(C)(1) OF ADEA
WERE FULLY IN ACCORD WITH
DEFENDANT'S PLAN:

* * *

Plaintiff's brief incorrectly states
that the Committee "felt that the amend-
ment concerning the bona fide executive
or high policy making required the
approval of the Board of Directors"

(plaintiff brief, p. 2). Plaintiff misstates the facts of record in this cause.

No documents of defendant's Committee even mention the need for Board approval. In fact, the Plan, all documents supplied to the Committee, the Committee RESOLUTION and the letter attached to the Committee minutes expressly require no Board approval.

* * *

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ATTORNEYS FOR DEFENDANT,
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COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CARL P. CALDWELL,)
Plaintiff,)
vs.) No. CIV-81-114T
SOUTHWESTERN BELL) [Filed Feb. 24, 1982
TELEPHONE COMPANY,) Herbert T. Hope
Defendant.) Clerk, U.S. Dist.
Court]

PLAINTIFF'S RESPONSE TO DEFENDANT'S
RESPONSE TO REQUESTS BY PLAINTIFF
TO FILE ADDITIONAL AMENDMENT TO
COMPLAINT IN MEMORANDUM IN
SUPPORT THEREOF

The above two documents, though filed on February 12, 1982, were, by reason of a weekend, a holiday, and mail delay, not received by the undersigned until just before noon on February 17, 1982. On that afternoon I had no opportunity to even read them, and because I was out of town until February 22, 1982, had no opportunity to examine them until that date. As yet plaintiff has neither been instructed nor invited to respond to such

instrument and under ordinary circumstances would not do so. An exception in this instance is made because of the numerous assertions that statements made in plaintiff's request to file the amendment and in the accompanying brief were "in error" as not being in accord with the discovered facts. This response is prepared to demonstrate that such statements themselves are the ones "in error". The two documents recently filed by the defendant will be referred to as defendant's "Response" and defendant's "Memorandum", both filed on February 12, 1982.

THE DOCUMENTS FURNISHED BY DEFENDANT
TO PLAINTIFF TO SUPPORT PLAINTIFF'S
REQUEST TO AMEND THE COMPLAINT

1. Basically, the defendant's position in both its "Response" and "Memorandum" is that the last paragraph of the Minutes of the Employees' Benefits Committee (attached as Exhibit "1" to defendant's "Memorandum" and likewise to

plaintiff's Brief to support his Motion to Amend) is neither a portion of the Resolution passed by the Committee nor does it reflect the action actually taken by the committee in that meeting. Since that paragraph affirmatively reveals that the chairman recommended and the committee "voted" that "the president submit the changes to the Board of Directors for consideration" it is difficult for us to understand why plaintiff was "in error" in stating that such action was taken by the committee.

2. In Paragraph 3 of its "Response" defendant, assuming *arguendo* that the applicable provisions of ERISA as quoted in plaintiff's Brief is applicable, asserts first that defendant acted fully "in accordance with the documents and instruments governing the plan". Then, it adds:

"In any event, the determination that the job plaintiff performed was sufficiently responsible to

come within the bona fide executive exemption to the AREA [sic] was made by the officers of the defendant. The Benefit Committee merely fixed the amount of pension due plaintiff." (Emphasis supplied.)

The quoted language comes as a surprise to us, in view of the language contained in the defendant's "Schedule of Authorizations - Application and Use" dated September 1, 1979 (furnished pursuant to plaintiff's Second Request, No. 7):

"Par. 1.01, Scope of Schedule - Subject to such policies and limitations as the Board of Directors may from time to time establish, the President shall have general charge and direction of the Southwestern Bell Telephone Company with authority to carry on its ordinary business. * * * Pursuant to this authority, the President delegates to the officers and other employees authority to act for the company as set forth in this Schedule * * *.

* * *

Par. 1.04 This schedule shall in no way affect delegation of authority made by the Board of Directors for the administration of the 'Plan for Employees' Pension, Disability Benefits and Death Ben-

efits. For matters relating to the administration of that Plan, reference should be made to the Plan itself and the authorities concerning it established from time to time by the Board of Directors."

There is no provision in the Schedule of Authorizations for the retirement of any employee. This authority rests exclusively with the Benefit Committee, appointed pursuant to the Benefit Plan, to administer the Plan as approved by the Board of Directors. In this instance, Southwestern Bell had its own Plan and was not included in the Plan of AT&T or any other of its subsidiaries. (Admission No. 2 to plaintiff's Request for Admission.) Additionally, it is noted that plaintiff's retirement letter came from the Benefit Committee and that he was retired under the Employees' Benefit Plan. (Letter from defendant to plaintiff dated October 11, 1979.)

3. With respect to whether or not the "opinion of the Committee" recommended

the submission of the amendments to the Board of Directors (rather than just to the President), defendant states, on Page 2 of its "Memorandum" that "the minutes of December 20, 1978 committee meeting included a copy of a letter authorized to be sent to the President of defendant by the chairman of the committee" and refers to defendant's response to plaintiff's original Request No. 3 for production of documents. It is noted that in such response there was no copy of a letter attached to the minutes of the committee's meeting of December 20, 1978. Now, however, defendant asserts that "The minutes * * * included a copy of a letter authorized to be sent to the President of defendant by the chairman of the committee." (Defendant's "Memorandum", (p.2) and infers that the suggested "form" letter received from AT&T and attached as Exhibit "2" to the "Memorandum" was the letter attached to

the minutes. There is simply no way this could be true because the said Exhibit "2" does not conform with the action taken by the committee. If any letter had been attached to those minutes it would necessarily, in conformance with the minutes, have advised that the committee, on recommendation of the chairman, had "voted" to request that the "President submit the changes to the Board of Directors for consideration." It would seem apparent that what happened is this: the committee desired that the proposed amendments (as forwarded by AT&T) be submitted for consideration by the defendant's Board of Directors. Accordingly, it did not attach the suggested letter (forwarded by AT&T) to its minutes. (If any letter was attached it would have included the committee's recommendation concerning submission to the Board of Directors.) The chairman alone included in his letter to the Pres-

ident of defendant a statement that such amendments required only the approval of the President. Such statements constituted neither the "opinion" nor the act of the committee. Acting thereon, defendant's President simply approved the letter written by the chairman and gave no consideration to the committee's recommendation, there being no indication in the chairman's letter that a copy of the committee's minutes were even enclosed.

On page 3 of its "Response" defendant lists seven (7) specific "facts produced in this cause" in support of its assertion that there is no basis for permitting the requested amendment. Plaintiff has no quarrel with numbers (2), (5), (6) and (7). With respect to (1) and its statement referring to "the recommendation of defendant to the committee" it is noted that if such a recommendation ever existed it has not been produced for

plaintiff's inspection. In regard to (3) we can- not agree that the Resolution (if it can be logically separated from the last paragraph of the minutes) constituted "the only official action of the committee". It is unrealistic to even suggest that the vote of the committee referred to in the last paragraph of the minutes did not constitute an "official act of the committee". With respect to (4), and as demonstrated above, it is apparent that if a letter was attached to those minutes, it most certainly would have been in conformity with the committee's recommendation.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CARL P. CALDWELL,)	
Plaintiff,)	
)	
vs.	)	No. CIV-81-114T
)	
SOUTHWESTERN BELL	)	[Filed May 3, 1984
TELEPHONE COMPANY,	)	Herbert T. Hope
Defendant.	)	Clerk, U.S. Dist.
	)	Court]

PLAINTIFF'S MOTION TO FILE
ADDITIONAL AMENDMENTS TO COMPLAINT

FIRST AMENDMENT

COMES NOW the plaintiff and moves this Court for leave to amend his Complaint by adding the two additional paragraphs originally requested to be added by plaintiff on January 26, 1982 (as amended by the pleading attached to his letter of February 9, 1982 to the Court incorpor-

ated herein by reference). (Appendix "A" attached hereto.) In support thereof plaintiff would show:

1. On January 26, 1982, plaintiff filed a request to file additional amendments to his Complaint, the proposed amendments, and a brief in support thereof.

2. On August 20, 1982, the Court entered an order denying said request to amend on the basis that it was "moot" in view of the Court's decision on that same date sustaining plaintiff's Motion for Partial Summary Judgment.

* * *

If plaintiff can prove the allegations made in his requested amendments of January 26, 1982, then the damage period would be extended until such time as

defendant adopted a valid retirement plan under which the defendant could even attempt to utilize the bona fide executive exception to the ADEA.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CARL P. CALDWELL,)	
<u>Plaintiff,</u>)	
)	
vs.	)	No. CIV-81-114T
)	
SOUTHWESTERN BELL)	
TELEPHONE COMPANY,)	
Defendant.)	

(PROPOSED) ORDER

Now on this ____ day of _____,
1984, comes on for hearing plaintiff's
Motion to File Additional Amendments to
Complaint, filed on May 3, 1984. After

being fully advised in the premises, the Court finds:

(FIRST AMENDMENT)

1. On August 20, 1982, the Court entered an Order denying plaintiff's previous request to amend his Complaint because it had become moot. . . . Said Order does not prohibit plaintiff from raising issues with respect to other conditions precedent in the Act before defendant is entitled to urge the "bona fide executive" exception. One of those conditions precedent is that the defendant, at the time of plaintiff's forced retirement, have in effect a validly adopted retirement plan which would allow the defendant to assert the "bona fide executive" exception to the ADEA. Plaintiff's requested first amendment

alleges that no such plan has been
validly adopted. If that allegation is
proved, then defendant would not be able
to claim the "bona fide executive"
exception until such time as it validly
adopted a by-law authorizing the same...

* * *

IN THE UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CARL P. CALDWELL,)	
Plaintiff,)	
)	
vs.	)	No. CIV-81-114T
)	
SOUTHWESTERN BELL)	
TELEPHONE COMPANY,)	
Defendant.)	

AMENDMENT TO COMPLAINT

Comes not the plaintiff and, with
permission of Court, amends his Complaint

as follows:

1. By adding, as paragraph 12(a):
"In addition, the defendant neglected to properly amend its 'Plan for Employees' Pensions, Disability Benefits and Death Benefits' with reference to the 'bona fide executive or high policy making position' exception to the 1979 [sic] amendment to the ADEA. For that reason, it had no legal authority on which to base its decision to retire plaintiff at age 65 and such act constituted a violation of the ADEA in that plaintiff had not attained the age of 70 years."

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CARL P. CALDWELL,)
Plaintiff,)
vs.) No. CIV-81-114T
SOUTHWESTERN BELL) [Filed May 30, 1984
TELEPHONE COMPANY,) Francis C. Bonsiero
Defendant.) Clerk, U.S. Dist.
Court]

DEFENDANT'S RESPONSE TO PLAINTIFF'S
MOTIONS TO FILE
ADDITIONAL AMENDMENTS TO COMPLAINT

Defendant's Response to Plaintiff's
Proposed First Amendment to Complaint

(Alleged Procedural Defects in the
Benefit Committee Actions)

Plaintiff's proposed first amendment
to complaint consists of two paragraphs
to be added to paragraph 12 of the
Amended Complaint, both of which para-

graphs concern alleged procedural defects in the process used by defendant's Employee Benefit Committee when amending its pension plan to incorporate 1978 ADEA amendments and fixing plaintiff's pension amount in anticipation of his age 65 retirement.

Plaintiff's requested first amendment does not deal with issues surrounding the conditions precedent to an age 65 mandatory retirement under ADEA, but rather alleges that the defendant's decision making process was defective in that the General Employee Benefit Committee of Southwestern Bell Telephone Company allegedly did not have a lawfully constituted quorum at its meeting held on November 13, 1979, which authorized the plaintiff's retirement pension and simi-

larly that the Committee's action at a meeting held on December 20, 1978, adopting the ADEA amendment to the Plan required approval of the Board of Directors.

* * *

Respectfully submitted,
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ATTORNEYS FOR DEFENDANT,
SOUTHWESTERN BELL TELEPHONE
COMPANY

**EXCERPT FROM CALDWELL'S REPLY
BRIEF FILED IN THE 10TH CIRCUIT**

**C. THE LOWER COURT ERRED IN
IN DENYING CALDWELL LEAVE
TO AMEND HIS COMPLAINT.**

Under 29 U.S.C. §631(c)(1), SWBT had to amend its pension plan so it could retire bona fide executives at age 65 and under 29 C.F.R. §860.120, it had to amend its Plan if it chose to freeze benefits for all employees who continued to work past age 65.

29 C.F.R. §860.120(a)(1) (regulation on freezing of benefits) and 29 C.F.R. §1625.12(b) (regulation on bona fide executives) have almost identical provisions and the latter is quoted below (unnumbered pps. 8 and 9 of attachments to Caldwell's brief in chief):

"Since this provision is an exception from the non discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakable met. Moreover, as with other exemptions from the Act, this

exemption must be narrowly construed."

Caldwell's request to amend his complaint is addressed to the most fundamental element that SWBT is required to meet, i.e., "were the terms of the SWBT plan properly amended so that the exceptions could be used under the provisions of 29 U.S.C. §623(f)(2) of the ADEA"? Simply put, the issue is whether SWBT's Board of Directors was required to approve the aforementioned changes in the plan. The SWBT pension plan authorizes the "Committee" to make changes in the Plan with the consent of the President and subject to the approval of the Board of Directors. (Addendum to Caldwell's brief in chief, item 1.) The Plan provides that the only exception to the requirement of Board approval is in those instances when "in the opinion of the committee" the changes "are dictated by requirement of federal or state statutes

. . . or authorized or made desirable by such statutes". Caldwell contends that "opinion of the committee" is controlling and that opinion is set forth clearly and unquestionably in the minutes of the December 20, 1978 meeting as follows:

On recommendation of the Chairman, it is voted that the Chairman be authorized to send the President a letter, copy of which is attached, recommending the changes in the Plan for Employees' Pension, Disability Benefits and Death Benefits, with the request that the President submit the changes to the Board of Directors for consideration. (Addendum to Caldwell's brief in chief, item 7.)

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**CALDWELL'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING
EN BANC**

* * *

As noted in Proposition "C" to Caldwell's Reply Brief, (pp. 10 and 11), under 29 U.S.C. §631(c)(1) Bell had to amend its plan so it could retire a bona fide executive at age 65. The amendment, properly adopted, was just as much a condition precedent to a lawful retirement as was the requisite that Caldwell's pension be nonforfeitable.

Effective January 1, 1979, it became unlawful for Caldwell to be retired at age 65. The only applicable exception was if Bell's pension plan provided for a bona fide executive exception per 29 U.S.C. §631(c)(1). Such an exception must have been incorporated into the Plan. Furthermore, as argued in the aforesaid sections of Caldwell's briefs filed herein, the Plan required the

approval by the Board of Directors for such an amendment. The Board of Directors never gave such approval, even though the benefit committee specifically conditioned the amendment of the Plan on the approval of Bell's Board of Directors. Therefore, by "sidestepping" Bell's Board of Directors, certain executives of Bell were able to obtain an amendment to Bell's pension plan in violation of the terms of the Plan and even in violation of Bell's fiduciary duties owed to the Plan's participants. One never will know whether the Board of Directors would or would not have approved such a bona fide executive exception which would have resulted in their and Caldwell's early retirement. Caldwell and other similarly situated plan participants were deprived of full review of this amendment by Bell's Board of Directors and such was a condition precedent for the implementation of the plan

amendment required to justify Plaintiff's early retirement under 29 U.S.C. §631(c)(1).

Without there being a provision in Bell's Plan for a bona fide executive exception to the Act's protection to age 70, 29 U.S.C. §631(c) has no applicability to Bell's retirement of Caldwell because, the pension plan itself must provide for the retirement of a bona fide executive at age 65 along with his right to a nonforfeitable annual benefit. Bell itself recognized this requirement, but was in such a rush to implement it prior to the January 1, 1979 effective date of the ADEA amendment, that Bell neglected (refused) to obtain its Board of Directors' approval as required under the Plan and as required by the Plan's Benefit Committee.

In summation and irrespective of Caldwell's status as a bona fide executive or the status of his pension plan

benefits as nonforfeitable, unless Bell properly enacted an amendment to its pension plan prior to the retirement of Caldwell, Bell is unable to rely upon the bona fide executive exception for his forced early retirement. By prohibiting Caldwell from amending his complaint to include such pertinent allegations and thereby proving them at a trial below, the lower court abused its discretion. The present Opinion in finding "no such abuse of discretion by the district court", renders the decision in conflict with the rule of law set forth by the United States Supreme Court in Foman vs. Davis, supra. and by this Circuit in Triplett v. LeFlore County, Okl., supra., and Childers v. Independent School District No. 1 of Bryan County, supra.

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